S. Hrg. 101-686

# GOVERNMENT OBSERVATION OF SAFETY AND HEALTH STANDARDS

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## HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

## S. 464

A BILL TO PROMOTE SAFETY AND HEALTH IN WORKPLACES OWNED, OPERATED OR UNDER CONTRACT WITH THE UNITED STATES BY CLARIFYING THE UNITED STATES' OBLIGATION TO OBSERVE OCCUPATIONAL SAFETY AND HEALTH STANDARDS AND CLARIFYING UNITED STATES' RESPONSIBILITY FOR HARM CAUSED BY ITS NEGLIGENCE AT ANY WORKPLACE OWNED BY, OPERATED BY, OR UNDER CONTRACT WITH THE UNITED STATES

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FEBRUARY 20, 1990

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**Serial No. J-101-57**

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Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
28-714 WASHINGTON : 1990

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-42.

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S. 464, a bill to promote safety and health in workplaces owned, operated or, under contract with the United States by clarifying the United States' obligation to observe occupational safety and health standards and clarifying United States' responsibility for harm caused by its negligence at any workplace owned by, operated by, or under contract with the United States. 4

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# GOVERNMENT OBSERVATION OF SAFETY AND HEALTH STANDARDS

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TUESDAY, FEBRUARY 20, 1990

U.S. SENATE,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 2:37 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senators Grassley and Thurmond.

## OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. The hearing will come to order. I welcome everyone here today, and look forward to this hearing on Senate bill 464. The stated purpose of this bill is to promote safety and health in workplaces owned and operated or under contract with the United States.

Clearly, this is a worthy and important goal, but in order to reach this goal the legislation would amend the Federal Tort Claims Act and restrict the Government's ability to use the discretionary function defense.

I believe that everyone would agree that Congress should be diligent in its efforts to ensure and improve workplace safety. The problem arises, however, as to the best method to achieve this worthy result. The purpose of today's hearing is to examine the merits of this legislation in connection with its stated purpose.

I am happy to chair this important hearing and look forward to hearing today's witnesses.

Senator Grassley, do you have an opening statement?

## OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Yes, I do. First of all, I appreciate your holding this hearing on the discretionary function exemption which has been part of the Tort Claims Act since 1946.

And I welcome all the witnesses, particularly Mr. Schwartz. Perhaps while he is here, Mr. Chairman, he could persuade you on the merits of Federal product liability. I have heard him on the other side of the issue.

As you know, Mr. Chairman, you and I are both members of the Federal Court Study Committee. It is an entity created by Congress to make a comprehensive review of all the Federal courts' problems. It is the first one in 200 years.

There is some irony in the fact that simultaneous with our meeting here, there is a meeting going on of the Federal Court Study Committee. And obviously you and I aren't there because we have got to be here, but that study committee is meeting under the assumption that we have got to reduce the Federal courts' enormous workload burdens.

And we are here at this meeting considering a bill that would have precisely the opposite effect. It would encourage long, protracted civil litigation in the Federal courts, and these courts are now so overburdened with criminal cases that civil cases aren't heard. Civil cases may become as extinct as the do-do bird has if we don't do something about this workload problem.

The Senate shouldn't consider legislation in a vacuum. Therefore, let me suggest that we need a much better reason for new liability laws than simply shifting responsibility to deep pockets. After all, we have also had an opportunity to hear Mr. Schwartz eloquently make the argument against that result many times before.

So before we do anything hasty here, let us also cast a careful eye toward the bill's impact on the courts' ability to deliver justice to those who need it. In this regard, we need to pay some attention to the views of those who actually represent the real tort victims here. Of course, we are going to have the opportunity to do that, and so I look forward to hearing their views, Mr. Chairman.

Senator HEFLIN. I call on a gentleman now for an opening statement who is as strong a believer in States rights as I am, Senator Thurmond.

## OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman. Today, we are assembled to conduct a hearing on S. 464, a bill introduced by Senator Sanford which concerns compliance with occupational safety and health standards in workplaces owned and operated by the Federal Government.

Additionally, S. 464 would amend the Federal Tort Claims Act to waive sovereign immunity and make the Federal Government responsible for harm caused due to alleged negligence at any workplace owned by, operated by, or under contract with the U.S. Government.

The Federal Tort Claims Act waives the sovereign immunity of the United States for purposes of tort liability predicated upon wrongful acts or omissions of Federal employees. However, there are express statutory limitations on the liability to which the Federal Government may be exposed.

One of the more important exceptions to liability is contained in 28 United States Code, section 2880(a), or the discretionary function exception. The purpose of the discretionary function exception is to protect the public treasury from damage suits arising out of policy decisions made by the Government.

The discretionary function exception limits tort liability which stems from the carrying out of essential Government activities, such as official actions and decisions based upon economic, social, or political policy judgments.

If enacted, S. 464 would severely narrow the application of the discretionary function exception. This could result in the exposure of the Federal Treasury to claims brought by those seeking to add the Government as an additional defendant.

Many argue that remedies for injured plaintiffs already exist under current law. For example, the workers compensation system ensures that those injured on the job will receive compensation. In addition, private tort actions are available against negligent manufacturers and suppliers.

In conclusion, the goals of S. 464 are laudable. Workplace safety should be an important concern of the Federal Government. However, the means to achieving greater workplace safety need to be examined carefully. Enactment of this legislation could lead to a substantial financial liability on the part of the Federal Government. Before any major changes to the Federal Tort Claims Act are initiated, we must be certain as to the ramifications of these changes.

I look forward to the testimony of all the distinguished witnesses who will appear before us today. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you.

[A copy of S. 464 follows:]

101ST CONGRESS
1ST SESSION

# S. 464

To promote safety and health in workplaces owned, operated or under contract with the United States by clarifying the United States obligation to observe occupational safety and health standards and clarifying United States responsibility for harm caused by its negligence at any workplace owned by, operated by, or under contract with the United States.

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 28 (legislative day, JANUARY 3), 1989

Mr. SANFORD (for himself and Mr. BOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To promote safety and health in workplaces owned, operated or under contract with the United States by clarifying the United States' obligation to observe occupational safety and health standards and clarifying United States' responsibility for harm caused by its negligence at any workplace owned by, operated by, or under contract with the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. USES OF DEFENSE.

(a) INAPPLICABILITY OF DF PROVISION.—The limitation on liability of the United States based upon exercise or performance or the failure to exercise or perform a discretionary function or duty as provided under section 2680(a) of title 28, United States Code, shall be inapplicable in any legal or administrative proceeding seeking damages against the United States in which the plaintiff alleges and proves that the harm for which the damages are sought was caused by the United States violation of occupational safety or health standards or which was caused by the United States negligence at any workplace owned by, operated by, or under contract with the United States.

○

Senator **HEFLIN**. Our first witness is Mr. Stuart Gerson, the Assistant Attorney General, Civil Division, of the Department of Justice.

## STATEMENT OF STUART M. GERSON, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. **GERSON**. Thank you, Mr. Chairman, distinguished members of the subcommittee. We are grateful for the opportunity of expressing the views of the Department of Justice regarding S. 464, which is intended substantially to abridge the so-called discretionary function exception to the Federal Tort Claims Act that Senator Thurmond just described.

For the reasons described in my written testimony, which I ask to be made part of the record herein——

Senator **HEFLIN**. It will be made part of the record.

Mr. **GERSON**. Thank you, sir, and which I shall summarize this afternoon, the Department of Justice respectfully opposes S. 464 because we believe that the discretionary function exception, as it continues to evolve through practice and judicial interpretation—most particularly, the judicial interpretation of the Supreme Court only in 1988—effectively serves the Nation by balancing between the substantive and pecuniary interests of the public at large and the individual interests of tort claimants against the United States.

If enacted, this bill could result in literally billions of dollars in additional expenditures from the Federal judgment fund, and I say that with regard, for example, to the fact that at this time there are more than 2,700 asbestos cases pending in which approximately $5.3 billion is sought.

None of these suits currently implicates the discretionary function exception. However, if suits previously dismissed could be reinstated or other actions could be brought, given the retroactive outlook of the proposed bill, the United States could be the substantial payor through the judgment fund of such judgments if this bill were to pass.

Similarly, OSHA reported for the year 1986, the most recent data that I have seen, almost 2 million manufacturing injuries. If one were to assign just as a baseline number a $100,000 value to each claim, that in and of itself—and that is just an arbitrary number; the number could be more or less for any individual claim. But at that number, that would involve over $190 billion in workplace potential claims if S. 464 were enacted.

The bill, irrespective of the merits of any lawsuit, also would generate many millions of dollars of additional cost by the necessity of additional lawyers and administrative support to my division, the Civil Division, and to the Justice Department itself merely to represent the United States in cases now barred by the exception. This prediction takes on significant meaning when one looks at the almost $200 billion in tort claims that now are pending against the United States.

The annual payout from the judgment fund currently resulting from tort claims liability runs at the average rate of somewhat over $200 million. Our success rate, of course, is something that the sponsors suggest is a reason to change the law. We suggest it is indicative of a system that is working well, well enough to continue with our current regime.

Experience suggests that the discretionary function exception is probably the most important reason that the Federal Tort Claims Act does not add several billions of dollars to the deficit every year.

The enactment of S. 464, with its substantial abridgment of the discretionary function exception, would destroy the balanced liability regime of current law and would impede effective governmental decisionmaking while creating immense budgetary risk. This seems altogether a bad bargain for the taxpayer, especially when one considers the comments which I have had the chance to read before this testimony today of the victims and putative victims of some of these situations that this bill would purport to cover.

They recognize that to the extent that difficulties are created for them, it is not by the Federal tort claims system. It is by the system of jurisprudence at large that requires the payment of a couple of dollars in processing costs for every 50 cents that ends up in the pocket of a victim or the families of the victims.

S. 464 would abrogate the discretionary function exception with regard to allegations that the United States had violated unenumerated occupational safety and health standards, or was otherwise negligent at any workplace owned, operated, or under contract by the Federal Government.

If this bill were enacted and then interpreted to mean, as is entirely possible, that the United States could be held liable when a private company violates a safety or health standard and the United States failed to cause the private violator to correct the problem beforehand, then the bill conceivably could federalize every occupational accident in the country and make the treasury the ultimate insurance fund for workers compensation claims, which now would be paid using the full measure of tort damages rather than the current State-based system that we have all come to know.

Multibillion-dollar liability for failure to correct private violations is currently barred under the discretionary function exception as it presently stands. As I noted, the particular anomaly of this bill—when it comes to victims themselves, there is a more than adequate remedy already existent to compensate such injuries through workers compensation and through private tort remedies that are available against manufacturers, suppliers, and others.

The so-called undercontract provision of the bill also would be likely to permit contractors to shift liability that they now assume from agencies' programmatic budgets to the judgment fund established under 31 U.S.C. 1304. That is the essence, we suggest, of the industry-based support for the bill, which could have substantial retroactive effect.

In any event, we believe it inappropriate to permit the judgment fund to be used to defray costs engendered in the course of operation of a Government contract. Besides the overwhelming pure cost of such a shift, we think that this reallocation of ultimate responsibility would transfer large costs for workplace accidents from the responsible employers to the general public, would likely reduce or eliminate the incentive for employers and other private parties to maintain a safe workplace, and instead would influence them to rely passively on Government action rather than their own initiatives, and would increase the complexity and burden of litigation over Government action in the area of workplace safety.

For all these reasons, we are opposed to this bill and ask for its rejection.

[The prepared statement of Mr. Gerson follows:]

**Department of Justice**

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STATEMENT

OF

STUART M. GERSON
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

S. 464

ON

FEBRUARY 20, 1990

Although the Department of Justice is compelled to state its opposition to S. 464, we greatly appreciate the opportunity presented by the Subcommittee to express our views and to contribute to what we hope will continue to be a useful dialogue relating to the question of private litigation against the government.

S. 464, which is intended substantially to diminish the so-called discretionary function exception to the Federal Tort Claims Act ("FTCA"), would, if enacted, determinatively alter the effective jurisprudential balance that has been struck between the substantive and pecuniary interests of the citizens of the United States at large and the particular interests of individuals seeking tort damage recoveries from the federal government.

Although the balance of interests impelled by the discretionary function exception, or indeed any such weighing among conflicting values, may be the subject of reasoned criticism, especially as applied to given cases, we believe that the exception, as it has evolved through practice and judicial interpretation, effectively serves the public interest. Accordingly, the Department would recommend Executive disapproval if S. 464 were presented to the President.

The FTCA's discretionary function exception was designed to secure the essential executive governmental function: the effectuation of official decisions and actions which are based upon economic, social, or political policy judgments. Notwithstanding the fact that the exception, as it has developed, is not applied when challenged activity is not based upon considerations of policy (thus allowing effective litigation as to whether or not policy considerations, i.e., governmental discretion, informed a given act), S. 464 would abolish the discretionary function exception entirely in a large category of cases.

The bill also would eliminate the FTCA discretionary function exception as to all torts arising in work places owned by, operated by, or under contract with the United States, even where the injury arose from work unrelated to a government contract. Thus, S. 464 would result in unprecedented liability for the government for injuries caused at entirely private workplaces merely because the contractor was engaged in some work for any agency of the United States.

S. 464 contradicts the very spirit of the FTCA, which was enacted in 1946, after a full 20 years of consideration. This lengthy span of time stemmed in part from paramount Congressional concern that the FTCA not open the Treasury to unprecedented liability. See, Jayson, Handling Federal Tort Claims, Ch. 2.

We object to S. 464 because it would unnecessarily subject the United States to enormous monetary judgments and enhanced defense costs while unwisely trammeling the ability of executive servants to adequately make the policy judgments which are lawfully committed to their discretion and expertise.

If enacted, S. 464 likely would result in billions of dollars of additional expenditures from the federal Judgment Fund, and many millions of dollars of additional cost generated by the necessity of additional lawyers and administrative support merely to represent the United States in cases now barred by the discretionary function exception.

There are currently more than $200 billion in tort claims pending against the United States. However, the annual payout from the Judgment Fund resulting from FTCA liability is presently running at the average rate of somewhat over $200 million. Experience suggests that the discretionary function exception is probably the most important reason that the FTCA does not add several billion dollars to the deficit every year. Enactment of S. 464 would destroy the balanced liability regime of current law and would impede effective governmental decision-making, while creating immense budgetary risk. This seems altogether a bad bargain for the taxpayer.

## The Impact on Litigation of S. 464

The discretionary function exception bars many kinds of suits arising from government regulatory, contracting and enforcement activities. S. 464 would open the way for large numbers of suits in each of these areas where the United States has heretofore been excepted from the need to defend itself at trial, let alone pay massive judgments.

The impact of the proposed changes is not theoretical. By way of example, we have compiled a list of 21 decisions applying the discretionary function exception in these particular contexts just during the period June 1988 through September 1989. These cases, which are listed in Appendix A, are merely exemplary; each of them involved several hundred million or more dollars in issue and would, if the Congress opened the floodgate, be followed by thousands of others (now barred) with similar prayers for relief.

Besides the cases discussed in the Appendix, which is far from a complete compendium, it also is instructive to examine the subject areas involved in such filings. They merely suggest the enormity of the potential impact upon the Treasury and upon Congressionally mandated programs implemented by government agencies and their contractors if this bill were to be enacted.

### OSHA Inspection Activities

Judy v. United States, 864 F.2d 83 (8th Cir. 1988) arose when plaintiff was severely injured after his left hand and forearm became entangled in a hydraulic shaping press. Although OSHA had inspected the facility and advised the employer that the particular press was not in violation of OSHA safety standards, the inspectors failed to discern that the particular press did not feature a properly guarded actuating mechanism. While noting that the case would be different had the plaintiff alleged that the inspectors actually knew that the press involved was in violation of OSHA's safety regulations and nevertheless decided not to take action, the Eighth Circuit held that the discretionary function exception barred this suit. Of course, plaintiffs in cases such as this are not without a remedy. They are entitled to recover workers' compensation benefits from the employer as well as possibly pursuing a product liability suit. In fact, worker compensation laws have been adopted by every state, without exception.[1]

## Asbestos Litigation

In numerous asbestos cases, the asbestos industry and its insurers are attempting to shift to the taxpayers the industry's tort liability to tens of thousands of workers. The amount of the industry's liability extends to the tens of billions of dollars. Most of that type of litigation arises out of shipyards in which Navy vessels were built, repaired and overhauled, largely during the World War II era. Due, in part, to correct application of the discretionary function exception by courts that have examined the issue, the United States has not been compelled to absorb the industry's losses. See Shuman v. United States, 765 F.2d 283 (1st Cir. 1985). The subject bills would change this substantially.

As of December 13, 1989, there were 2,709 asbestos cases, involving 3,393 underlying claims, pending against the United States raising tort issues which would be affected if S. 464 were enacted. We do not have a precise figure for asbestos suits which have already been dismissed on the basis of the discretionary function exception. However, that figure would amount to many millions. Moreover, because the courts are deprived of subject matter jurisdiction by virtue of the discretionary function exception, dismissal of some of these suits might be deemed to be without prejudice if S. 464 became law.

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[1] Larson, The Law of Workmen's Compensation, § 5.30.

## Work Place Regulation

S. 464 relates to occupational safety and health matters. In that regard, we note that, in 1987, the Labor Department's Occupational Safety and Health Administration (OSHA) conducted 61,451 inspections. OSHA reports that private sector injuries and illnesses in manufacturing alone for 1986 totaled 1,948,800.[2] Many of these occupational injuries and illnesses occur in workplaces regulated by OSHA[3]. Clearly under S. 464, an unprecedented flow of expensive new litigations would follow. It is possible that if S. 464 were adopted, the United States could be facing billions of dollars in claims. In this era of explosive litigation rates, there is no compelling reason to abandon a satisfactory status quo.

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[2] Report of the President to the Congress on Occupational Safety and Health for Calendar Year 1987 (U.S. Department of Labor 1988) at 110, Table 9.

[3] Similarly, the Labor Department conducted inspections of 5,057 coal mining operations and 11,413 metal and nonmetal operations during fiscal year 1987. In coal mining operations alone, there were 14,252 injuries. Annual Report of the Secretary of Labor Under the Federal Mine Safety and Health Act of 1977 (U.S. Department of Labor) at 7 and table 6.

Of course, the Congress has enacted many other workplace regulatory programs. The number of workers performing work under government contracts is plainly very large.

## The Federal Tort Claims Act

The FTCA confers exclusive jurisdiction upon federal district courts for claims of personal injury, death, or property damage which are "caused by the negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). This grant of jurisdiction, however, is made "[s]ubject to the provisions of chapter 171 of this title," which contains the limitations and conditions for suit against the United States.

Many of those limitations are contained in 28 U.S.C. § 2680. The first, and probably most important, of these exceptions to tort liability is 28 U.S.C. § 2680(a), which provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to: (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Thus, § 2680(a) contains two separate provisions: a "due care" exception and a "discretionary function" exception. It is the latter exception with which we are concerned today.

The legislative history of the FTCA shows that the basic purpose of the discretionary function exception is to protect the public from damage suits arising out of policy decisions. See, H.R. Rep. No. 2245, 77th Cong., 2d Sess., p.10.[4] See also Statement of Assistant Attorney General Shea, at the Hearings before the Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., pp. 28 and 33 (§ 2680(a) was "designed to preclude application of the act to a claim based upon an alleged abuse of authority by a regulatory or licensing agency .... The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like."

The exception recognizes that governmental decisions cannot be made wisely or well when policy judgments become the basis of tort liability. We see no reasoned challenge to that proposition. If the decisions of government officials are linked to tort liability, there could be a strong incentive for government officials to do as little as possible. Officials would be motivated to do what was "safe", not necessarily what was right. At the same time, were S. 464 enacted, private industry could use the FTCA and lawsuits as a cudgel to keep government from regulating workplace safety. Government officials, in turn, would be more prone to issue safety regulations rather than taking hands-on action. In the end, the public would suffer.

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[4] The same legislative history was repeatedly included in congressional committee reports appearing after 1942. See Jayson, Handling Federal Tort Claims, Ch. 12, Section 246, p.12-19.

## Provisions of S. 464

S. 464 would abolish the discretionary function exception in FTCA proceedings where

> the harm for which the damages are sought was caused by the United States violation of occupational safety or health standards or which was caused by the United States negligence at any work place owned by, operated by, or under contract with the United States.

However, a remedy already exists to compensate all injuries encompassed under S. 464. Workers' compensation ensures that workers will receive monetary payments if they are injured. Private tort remedies are also often available against manufacturers, suppliers and others.

As the reported case law strongly suggests, the bill's very-general operative term -- "violation of occupational safety or health standards" -- is subject to unconfined interpretation. For example, that language could be held to include an inspector's failure to uncover violations of safety or health standards at a private plant. If that interpretation is accepted (and litigation over its meaning is a certainty), the United States could be held responsible for the conduct of private companies engaged in entirely private activities because of a regulatory "violation".

Potentially limitless liability would be created in circumstances where liability does not now exist. See, e.g., Judy v. United States Dept. of Labor, ibid; Galvin v. Occupational Safety & Health Admin., 860 F.2d 181 (5th Cir. 1988)(OSHA cases). While litigation persists over the issue of when liability is precluded by the discretionary function exception,(e.g., Patterson v. United States, 856 F.2d 670 (4th Cir. 1988), vacated, 866 F.2d 1538, different result reached on rehearing en banc, 881 F.2d 127, (1989) (surface mine safety case); cf., Dube v. United States, 870 F.2d 790 (1st Cir. 1989)), multibillion dollar liability for failure to correct private violations of occupational safety or health standards is barred under the discretionary function exception as it presently stands.

If S. 464 were enacted and then interpreted to mean, as is entirely possible, that the United States could be held liable when a private company violates a safety or health standard and the United States failed to cause the private violator to correct the problem beforehand, then the bill would federalize every occupational accident in the country and make the Treasury the ultimate insurance fund for workers' compensation claims (which will be paid using the full measure of tort damages).

Besides the overwhelming pure cost of such a shift from the current system, this reallocation of ultimate responsibility would likely reduce or eliminate the incentive for employers and other private parties to maintain a safe work place. The multibillion dollar drain on the Judgment Fund would thus be a deficit of dual effect.

If the United States were to be held liable for "violation of occupational safety or health standards" it would inevitably and necessarily seek to join as defendants the directly responsible tortfeasors, i.e., the owners of plants, machinery and subcontractors, depending on the evidence of culpability. Workers' compensation statutes might sometimes provide a barrier to these potential defendants' liability. Plainly speaking, the shift of risk and burden envisioned by S. 464 would constitute a corporate windfall in a time of fiscal constraint with private corporations gaining at the expense of the public treasury.

Where private parties could be added to litigation in which the United States might become a target defendant, their financial responsibility would be reduced because they could seek contribution from the United States even when the private defendant is the active tortfeasor (the usual case) if the United States might be deemed to share a measure of responsibility for "violation of occupational safety or health standards". The end result of all this litigation is difficult to predict but, certainly, the only guaranteed beneficiaries would appear to be private attorneys and private industry. For example, it would be unfortunate for asbestos manufacturers to reap a windfall at taxpayer expense.

Indeed, S. 464 could, in effect, open the courthouse door to persons who were federal workers and prohibited from directly proceeding against the government. For example, a manufacturer sued by an employee could turn around and add the United States as a third-party defendant. Thereafter, the United States could be indirectly held liable for a tort causing injury to a worker despite the payment of workers' compensation benefits by the federal government to the worker. The discretionary function exception is a major protection against such unwarranted raids against the Treasury.

## Work Place Liability

S. 464 also would deprive the discretionary function exception of its force for litigation arising "at any work place owned by, operated by, or under contract with the United States". This would permit government owned, contractor operated contractors (GOCO) to shift liability they now assume from the agencies' programmatic budgets to the Judgment Fund established under 31 U.S.C. §1304. We believe it inappropriate to permit the Judgment Fund to be used to defray costs engendered in the course of operation of a government contract.

The general rule is that contractors are responsible for their torts. *See*, 28 U.S.C. §2671; *see also*, *Restatement of Torts (Second)* §409. Where the United States is directly responsible for a tort, as responsibility traditionally has been defined, it now can be held liable for its negligence. However, the discretionary function exception precludes suits which arise out of the government's discretionary decisions in selecting a contractor and in its overall policy decisions as to the program that the contract fulfills.

A tort suit should not be the vehicle for litigation of these basic policy questions. Accordingly, the courts have properly declined to enter the area either at the behest of the contractor, *e.g.*, *Scanwell Laboratories, Inc. v. United States*, 521 F.2d 941 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 910 (1976), or at the behest of a plaintiff in a private tort suit, see, e.g., Boyle v. United Technologies, Corp., -- U.S. --, 108 S.Ct. 2516 (1988). This judicial declination is consistent with sound public policy.

The exception thus avoids potentially limitless awards for policy-making "negligence" which is not the sort of "garden variety" negligence that prompted the Congress to enact the Federal Tort Claims Act in the first place. It is especially inappropriate to enhance the likelihood of federal liability because workers injured at any facility covered by the bill have currently-available workers' compensation remedies. Further, to the extent that persons other than an employer or the United States were responsible for injurious activity, affected parties have the usual range of tort remedies.

If the bill became law, it then would become incumbent upon the United States to ensure that its contracts permit claims for indemnity and/or contribution from its contractors. Indeed, this is the usual rule. See United States v. Seckinger, 397 U.S. 203 (1970). This additional liability, visited upon contractors with the United States, would also be available to the extent that tort law could be influenced by the United States also to provide a direct non-contractual remedy. In both events, a major portion of the liability might be shared with contractors.

To be sure, decades of litigation over the many new questions would be necessary. The effect of litigation might well be to enable the workers' compensation statutes to be evaded indirectly through the means of suit against the United States. If the workers' compensation systems do not provide sufficient remedies, then a review of those systems would be preferable to the imposition of substantially-enhanced tort liability on the United States.

## S. 464 Will Decrease Safety Incentives

Enactment of S. 464 would tend to decrease workplace safety because, under prevailing occupational law, most employers in most states cannot be third-partied into an employee's case against the United States because of the workers' compensation bar. The compensation carrier, however, would have a lien against the employee's recovery. Therefore, to the extent that the United States is sued for its policy judgments, it could not share with the employer that percentage of fault due to the employer's negligence. In fact, the employer would receive an unintended and unwise benefit from the recovery against the United States because its workers' compensation insurance premiums will be diminished (because of recovery on the lien), a benefit otherwise unavailable if there were no recovery against the United States. Thus, S. 464 would allocate resources in an inefficient way by forcing the United States to shoulder a disproportionate share of liability (assuming that it should have any at all), and also removes much of the financial incentive (i.e., insurance premium cost control) that now compels companies to assure safety.

If S. 464 is enacted, it also is likely that agency energies and attention will be diverted by the travails of tort litigation from enforcement of Congressionally mandated programs. The consequences of this additional practical barrier to vigorous governmental implementation of statutorily authorized programs and activities deserve careful consideration.

The second clause of S. 464 could fairly be read to go beyond occupational injuries (and include accidents such as the typical slip and fall cases) so long as the injury arose in a work place. As previously noted, the inclusion of injuries at work places "under contract" with the government, without a requirement that the injuries occur in the performance of the government contract, exposes the United States to potential liability for injuries occurring elsewhere on the contractor's premises. For the reasons already mentioned, this would do little to promote the efficient allocation of resources.

Because we share with the sponsors and the Committee the desire to promote workplace safety, we find a twofold reason for the rejection of S. 464: it interferes with a successful and economical system to address workplace injuries; and it will not augment, and may indeed diminish, employers' and agencies' incentives to assure safe and healthful working environments.

In the latter regard, we suggest that the reality of the appropriations process is such that the already-limited funds assigned to agencies are unlikely to be diminished by requiring them to pay tort judgments from their operating revenues. Indeed, damages are not now usually paid from agency funds in any event. Additionally, we reiterate that the possibility of a plaintiff's recovery against the United States likely will mean that contractors who operate federal or private facilities will have less need or incentive to exercise due care. Thus, while we certainly support the stated goal of S. 464, to promote work place safety, that goal may actually suffer a setback if the bill is enacted.

## Summary

The discretionary function exception was the result of very careful and extended deliberations by the Congress. Its legal significance has developed over four decades of case-by-case evolution in the federal courts. Both the Congress and the courts heretofore have understood that the exception serves the purpose of ensuring that the federal government does not have to bear potentially-enormous liabilities arising from its discretionary functions. Moreover, the Congress and the courts clearly have recognized the obvious inappropriateness of having judges determine after-the-fact whether federal policy decisions were "negligent."

While undoubtedly imperfect in its application, and often controversial, the discretionary function exception has worked well to date. It has permitted the compensation of persons injured by the federal government through negligent acts similar to those which generate tort liability among private parties, without exposing the government to enormous unprecedented liability and endless litigation for its policy judgments. S. 464 would jeopardize the delicate balance that has been the key to the success of the FTCA, which has served this nation so admirably. In sum, S. 464 is extraordinarily unwise legislation.

I am happy to respond to your questions.

# APPENDIX

## Decisions Applying The Discretionary function exception To Government Regulatory And Contracting Activities

June, 1988 - September, 1989

### COURTS OF APPEALS

### D.C. CIRCUIT

Wells v. United States, 851 F.2d 1471 (D.C. Cir. 1988). Discretionary function exception ("DFE") precludes suit for EPA negligence in regulating and communicating knowledge of public health risks and lead pollution dangers where decision to conduct further study while refusing to take immediate remedial action or accept lead company's offer to clean up area is based largely upon policy considerations.

### FOURTH CIRCUIT

Patterson v. United States, 881 F.2d 127 (4th Cir. 1989). DFE bars suit for determination by Office of Surface Mining inspector that no emergency existed to warrant expenditure of funds.

### FIFTH CIRCUIT

Lively v. United States, 870 F.2d 296 (5th Cir. 1989). DFE protects GSA's decision to stockpile asbestos, to not place warning on bags of asbestos imported for stockpiling, and to not provide or require safety equipment or safety programs for stevedores handling asbestos, because decision to stockpile is grounded in social, economic and public policy considerations.

Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988). DFE bars allegations that OSHA inspector failed to inspect or negligently inspected machinery and failed to ensure that employer complied with OSHA regulations requiring placement of guards on machinery.

### EIGHTH CIRCUIT

Judy v. United States Dep't of Labor, 864 F.2d 83 (8th Cir. 1988). DFE bars suit for OSHA inspectors' negligence in erroneously advising an employer that a hydraulic press meets OSHA safety standards. Court explained that although DFE does not bar claim that agency failed to act in accordance with specific mandatory directives, statutes and regulations cited by plaintiff require action by OSHA official only when he concludes that inspection has uncovered a violation.

**TENTH CIRCUIT**

Middlehurst v. United States, No. 88-2596 (10th Cir. Aug. 10, 1989). Despite allegations of a failure to accord with a specific mandatory directive, DFE bars suit for OSHA negligence in inspecting and supervising safety of premises of plaintiff's employer where plaintiff has failed to identify any statutes, regulations or policies prescribing mandatory duties and cites only to a provision referring to the general manner of conducting inspections.

**ELEVENTH CIRCUIT**

Johns v. Pettibone Corp., 843 F.2d 464 (11th Cir. 1988). TVA employees' decision to delegate safety to contractor is discretionary, barring suit by electrocuted contractor employee on failure to warn theory.

## DISTRICT COURTS

**CALIFORNIA**

Freeman v. United States, No. 85-6123 (N.D. Cal. June 24, 1988). DFE bars suit for slip and fall injuries sustained by employee of contractor to whom Department of Labor had contractually delegated responsibility for ensuring safety at Job Corps site.

**HAWAII**

Jones v. United States, 698 F. Supp. 826 (D. Haw. 1988). DFE protects Air Force's decision to approve use of chlordane since it involves "weighing . . . the needs of effective and economical pest control against the need to keep any contamination of the environment to a minimum" and is "grounded in social, economic, and political policy." DFE also protects decision "to utilize and rely upon an independent contractor for pest control" and to delegate primary responsibility for safety to contractor based upon policy judgments. DFE also bars suit for negligent monitoring and over-sight since "the degree to which the government monitors compliance with its regulations is a discretionary function."

**ILLINOIS**

Fairchild Republic Co. v. United States, 712 F. Supp. 711 (S.D. Ill. 1988). Court held that Air Force's failure to warn of dangers of asbestos inhalation, supplying asbestos tape and requiring its use in work on airplane, allowing asbestos dust to remain in workplace, failure to provide protective equipment, and failure to establish a policy as to asbestos use were decisions within parameters of DFE.

## LOUISIANA

Kearny Barge Co. v. Le Doux, Inc., 709 F. Supp. 720 (E.D. La. 1989). DFE bars action alleging Coast Guard negligent inspection and certification of barge for ocean-going service, which later sinks.

## MICHIGAN

Lockett v. United States, 714 F. Supp. 848 (E.D. Mich. 1989). EPA's failure to warn and protect residents from PCB emanating from environmental pollution site is a discretionary function because administrative determinations regarding method and manner of investigation take into account policy considerations as to public health hazards, sufficiency of evidence to support enforcement action, and availability of resources.

## NEW HAMPSHIRE

Irving v. United States, No. C 81-501-D (D. N.H. Feb. 15, 1989). DFE bars allegations of OSHA inspector's failure to discover dangers of shoe machinery which entangles worker's hair.

## NEW JERSEY

Williamson v. Northeast Regional Postmaster Gen., No. 88-123 (D. N.J. July 5, 1988). DFE bars action alleging EEOC intentionally inflicted emotional distress by mishandling complaints of racially motivated employment discrimination, failing to order Postal Service to properly process employee's first complaint, condoning Postal Service's discrimination by affirming its decisions, and withholding evidence.

## NEW YORK

In Re Joint E. and S. Dists. Asbestos Litig., 1989 U.S. Dist. LEXIS 1596 (E.D., S.D. N.Y. Jan. 13, 1989), affirmed, 891 F.2d 31 (2d Cir. 1989). Failure to warn of dangers of asbestos and to provide safety equipment for protecting against hazards on ships operated through War Shipping Administration during WWII.

Markes v. United States, 704 F. Supp. 337 (N.D. N.Y. 1988). In suit by contractor's employee injured while roofing, court held that United States had discretion to delegate primary safety responsibilities to contractor, but reserved judgment as to whether DFE bars claims alleging failure to oversee contractor's work, observe safety violations and bring violations to contractor's attention.

**TEXAS**

Chapa v. United States, No. B-88-127 (S.D. Tex. Mar. 3, 1989). DFE bars suit for OSHA inspectors' negligence in performing inspections and in failing to issue citations for violations of safety regulations or to conduct inspections.

**VIRGINIA**

Fortney v. United States, 714 F. Supp. 207 (W.D. Va. 1989) (appeal pending). After Supreme Court vacated judgment in favor of United States and remanded for further proceedings in light of Berkovitz [Fortney v. United States, ___ U.S. ___, 109 S.Ct. 210 (1988)], district court held that regulations included in Army safety manual prescribing types of containers for storing flammable material and providing sprinkler system specifications were discretionary since each employed the word "should" rather than "must."

Thompson v. Dilger, 696 F. Supp. 1071 (E.D. Va. 1988). DFE bars suit for encouraging and failing to supervise private weaponry development and procurement and handling of ammunition provided by the United States.

**WYOMING**

Redman v. United States, 710 F. Supp. 765 (D. Wyo. 1989). DFE bars wrongful death claims arising from plane crash resulting from FAA negligence in flight testing pilot and removing pilot's visual flight rules limitation because FAA made policy decision to afford reasonable period within which changes could be made in pilot certification requirements.

Wallace v. United States, No. C89-0037-B (D. Wyo. Aug. 2, 1989). DFE bars suit for death of mine worker crushed by modified teletram which MSHA negligently allows mine operator to use without reinspection and recertification, since MSHA's inspection and enforcement activities require its employees to exercise discretion in performing mine inspections.

Senator **Heflin**. Senator Grassley, do you have any questions?

Senator **Grassley**. No, I don't. Thank you very much, Mr. Gerson, for your testimony.

Senator **Heflin**. Senator Thurmond, do you have any questions?

Senator **Thurmond**. Thank you.

Mr. Gerson, in your prepared statement you claim that if enacted, S. 464 would likely result in billions of dollars of additional expenditures from the Federal Judgment Fund and many millions of dollars of additional costs generated by the necessity of additional lawyers and administrative support to represent the United States in cases now barred by the discretionary function exception.

Could you elaborate on the costs the Government could be expected to bear if S. 464 is enacted and the basis for such estimates?

Mr. **Gerson**. I will try, Senator Thurmond. Of course, it is impossible to make such an estimate with any scientific precision, but we know several things. This particular bill relates to activities in workplaces that have some sometimes attenuated Federal connection.

Two examples that we have cited just to highlight the magnitude of the number we are talking about are asbestos claims—a lot of the industries that are supporting this bill have a relationship to those claims—and safety and health claims that relate to OSHA workplace regulation.

As to asbestos claims, as I mentioned earlier, there currently are over 2,700 such cases pending where the damages sought are in excess, or have been in excess of $5 billion. To this point, the United States has not been a possible payor of such judgments solely because of the discretionary function exception. There would be some significant segment of those cases, in toto measuring $5.3 billion, to which the United States conceivably would become subject if this bill were to pass.

In the area of injuries and illnesses that occur in the workplace, OSHA reports almost 2 million such cases of varying sizes and complexities in a given year, 1986, the most recent year for which we have seen data. The cost of those cases, if they all resulted in lawsuits, would be well in excess of $100 billion.

The nexus between Government relationship and potential liability for a lawsuit, the way this bill is drawn, is so slight—and, of course, it is retroactive, given the way this bill is set up—that the potential liability for the United States could be a significant segment of a number that is well in excess of $100 billion for a single year.

There is no way to know how many cases there would be. Surely, the United States would have good defenses in the overwhelming majority of the cases that would be brought. But given the fact that so many cases are brought against private parties, in a sense it would be a free additional ride to join the United States and to make us defend the cases, Senator.

And so we know that while we would probably win a majority of the cases, we would lose some, and the amounts there would be immense. And, certainly, in defending the extra cases, which, as Senator Grassley pointed out earlier, would threaten logjams in the courts, I know that the Civil Division's budget would have to be far in excess of what it is today, and it is pretty substantial.

Senator THURMOND. Mr. Gerson, some believe that enactment of S. 464 may actually decrease workplace safety. In your opinion, would providing the possibility of indemnification by the Federal Government for negligence committed by private employers provide a disincentive to private industry to maintain a safe workplace?

Mr. GERSON. Well, I suggested earlier that I think the answer to that hypothetical question is yes. When you shift the responsibility from the private party, from the person or company that is performing the Government contract that has responsibility and an incentive to maximize its profit under the contract, and you shift that potential cost against the contract to the judgment fund, I think you reduce that incentive to the private party, who then takes a passive role trying to shift the responsibility over to the Government.

I think there are substantial incentives for Government inspectors and Government regulators under the current regime. This committee and others look with stringency at what the Federal responsibility is, and I think there are plenty of incentives for meeting it. I think if this bill were adopted, it wouldn't increase the Federal incentive, which already is high. It would decrease the private incentive to safety.

Senator THURMOND. Mr. Gerson, how do you react to the charge by those who seek indemnity from the Government that recent court decisions which have upheld the discretionary function exception are merely cases of unchecked judicial activism which requires the congressional clarification sought in S. 464?

Mr. GERSON. Well, I, like you, Senator, in a personal note, see an evolution in the decisions of the Supreme Court of the United States, which I think one can fairly say is generally a conservative Court.

In June 1988, the Supreme Court decided the case of *Berkovitz* v. *United States*, which deals with the discretionary function exception, describes three circumstances under which proponents argue that it could apply, and then holds that there is only one of them, a pure discretionary function, where there is a policy judgment made by the United States where the exception does, in fact, apply.

So I think that it is fair to say that a conservative Court has ruled that there are varying degrees of potential inquiry, and that the discretionary function exception is not a blank check, or a reverse blank check to the United States, and that the courts are equipped to deal with these cases as they come up. It is not a categorical bar to all litigation against the United States.

Senator THURMOND. Thank you very much. Thank you, Mr. Chairman.

Senator HEFLIN. Mr. Gerson, the bill would alter the discretionary duty defense under the Federal Tort Claims Act. Could you describe the general purpose for this defense in the Federal Tort Claims Act overall scheme?

Mr. GERSON. The purpose of the defense is twofold, in a sense, Judge Heflin. Historically, the discretionary function exception is what is left, an important matter of what is left, to sovereign immunity.

When, after 20 years of study on the matter, the Congress enacted the Tort Claims Act, it didn't want to go too far in waiving the sovereign immunity of the United States, or the immunity of any sovereign, for that matter. Sovereign immunity didn't originate in this Republic.

Hence, it was designed to serve as a check or balancing between public and private interests, short of a wholesale waiver of sovereign immunity. That is the historical reason, and it is still a valid one.

The practical reason to have the discretionary function exception is to allow Federal decisionmakers to exercise that discretion in an unbiased, dispassionate way on behalf of the people of the United States without looking over their shoulder at being second-guessed.

We want our public servants, within their proper spheres of discretionary activity, to be able to exercise that discretion. And so it is a viable and valid method toward being able to get good public service out of public servants. I think those two reasons still obtain today, and that when you look at the system overall, it tends to work.

Senator HEFLIN. Thank you, sir.

Our first panel is Mr. Victor E. Schwartz and Prof. Andrew Popper. Mr. Schwartz, we would be glad to hear from you.

## PANEL CONSISTING OF VICTOR E. SCHWARTZ, PARTNER, CROWELL & MORING, AND ADJUNCT PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC, ON BEHALF OF EAGLE-PICHER INDUSTRIES, INC.; AND ANDREW F. POPPER, PROFESSOR OF LAW, AND DEPUTY DEAN, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW, WASHINGTON, DC

### STATEMENT OF VICTOR E. SCHWARTZ

Mr. SCHWARTZ. I would ask that my statement be made part of the record.

Senator HEFLIN. It will be.

Mr. SCHWARTZ. Thank you, Judge, and I will just summarize it. S. 464, in essence, is just doing two things: to place clear and unambiguous incentives on the Federal Government to keep its workplace safe, incentives that are needed because currently criminal law sanctions don't apply, and provide tort compensation in situations where anyone else in our society would be held liable.

When I hear Mr. Gerson describe the Federal Tort Claims Act, there are certain things he really leaves out, and they are very, very important things. The Federal Tort Claims Act is not an open-season hunting license to plaintiffs. A person can only recover if he proves negligence—old-fashioned negligence from the forties and thirties, the type of negligence that we learn about in law school.

Second, there are no punitive damages against the Federal Government. Third, plaintiff attorneys' fees are limited. Their contingent fee is not full and open as it is in private parties. Also, there is no jury.

Now, in addition to all of these things, there is a protection called the discretionary function exception, and I agree with its purpose. When people are in the Federal Government and they are in high positions, they ought to be able to exercise discretion and make policy decisions without fear of liability.

But, gentlemen, that is not what has happened with the discretionary function over the past 20 years. I hadn't looked at it in detail in a long time. I had stopped law teaching back in 1976. When I went back and looked at the monographs prepared by the Department of Justice and saw what happened to the discretionary function exception, I was really and truly surprised.

Somebody doesn't warn uranium miners about certain dangers, a warning that could be easily made; it is discretion. Somebody doesn't warn people about asbestos dangers, where a mask could be provided for industrial hygiene and protection. That is discretion.

There is a volume of cases of failure to warn people where very easily a person in charge of a workplace could make that warning, where the warning wasn't done, and it is called discretion.

Now, courts to some extent have realized that there has been discretionary function overkill. A couple of years ago, the Federal Government was in the Supreme Court of the United States and arguing that when it violated one of its own rules of law that that was discretion. Well, the Supreme Court didn't buy that, nine, nothing. But the case is an example of the kind of overkill that has been injected into this doctrine, overkill that was not there when I studied it a decade or so ago.

Recently, the first circuit has recognized that the discretionary function is an overkill, and they held in an asbestos case where a victim was seeking recovery that when no decision was made one way or the other, that wasn't a discretionary function judgment.

Now, that case has not been appealed by the Department of Justice, and it is kind of surprising. If all of this is going to cost billions and billions of dollars, I would think they would have appealed it. Maybe they have a feeling that it might have been right.

You know, when young people come to the Department of Justice, they get these three volumes to teach them about discretionary function. And if you would go back in time and be a young law student coming in the Department of Justice, you would get these volumes and you would be told to read them, and probably they would quiz you on them.

Let me share with you very quickly what they tell the young people that are coming in the Department of Justice today about the discretionary function. They say that if no Federal statute has been violated and no mandatory requirement has been provided, that is discretion. In other words, if the Federal Government hasn't violated the law, they can do anything, and it is right in their own manual.

It has been said that this bill would break the Federal budget. It won't. It doesn't allow suits by Federal workers. It doesn't impose any duty on the Federal Government that is not there before. It doesn't create any new substantive rights for plaintiffs, and it excludes most matters that would be of concern—economic decisions made by the Government.

In my paper, I show how it would really affect asbestos cases, and the number of cases that would be affected by this bill. The numbers don't at all correspond with those put forth by the Department of Justice.

It has been argued that somehow this would delay cases, and I appreciate the concern that Senator Grassley brought forward earlier. We do not want this bill to delay cases, and if there are not sufficient protections in it, we would be pleased to work with the committee to avoid that result.

But, frankly, under current law, if a victim's claim is going to be delayed, the Federal court has absolute discretion to cut off any contribution claim against the Federal Government and try it separately. My paper details why there would not be delay from this bill.

There is modest retroactivity in the bill. We have provided, and will provide, detailed explanations of the degree of retroactivity that is appropriate.

In essence, what is going to be achieved with this bill is encouragement of the Federal Government to act safely. Broad, wide-ranging, open discretion will be at an end. We would return discretionary function to its roots and its original purpose, which was to allow officials to make broad-based public policy decisions.

Thank you, and I would appreciate your questions now.

[The prepared statement of Mr. Schwartz follows:]

# Statement of Victor E. Schwartz

Partner, Crowell and Moring

Adjunct Professor of Law, Georgetown University Law Center

before the

Subcommittee on Courts and Administrative Practice

of the

Senate Committee on the Judiciary

Concerning S. 464

February 20, 1990

Thank you Mr. Chairman for holding this hearing on what I believe will be the most important issue of the 1990's - what is the proper scope of governmental liability. S. 464, the Government Workplace Safety Act speaks directly to that topic. It is designed to place the Government on a more even tort pedestal with everyone else in our society and to clarify one of the most obscure and confusing doctrines in American tort law - the "discretionary function" immunity to the Federal Tort Claims Act (FTCA). S. 464 provides that the Government should not have "discretion" to violate its own applicable health or safety regulations or to be negligent in workplaces over which it has practical control. The fundamental purposes of the legislation are two-fold. First, it would place clear and unambiguous incentives on the Federal government to keep its workplaces safe and, second, provide tort compensation in situations where anyone else in our society would and should be held responsible.

Let me share with you briefly my background in the subject of torts because that serves as the basis for my views about S. 464. I have served as a law professor and Dean at the University of Cincinnati Law School, and currently am an adjunct professor at Georgetown Law Center and co-author of the most widely used law school textbook on the subject of torts, Prosser, Wade & Schwartz, Cases and Materials on Torts (8th ed. 1988). I was chairman of the Federal Interagency Council on Accident Compensation and Insurance. I had the responsibility of coordinating tort and insurance policy issues within the Federal government. I also chaired the Federal Interagency Task Force on Product Liability. For the past 10 years, I have chaired the Torts and Insurance Practice Group at the law firm of Crowell and Moring. In this context, I have represented both plaintiffs and defendants in tort litigation and also have worked on the formulation of legislative tort policy.

## S. 464 in Context

My background has helped me place S. 464 in context. Critical to this "context" is the fact that the Federal government is a most unusual defendant - its liability exposure is much less than ordinary, private citizen defendants. First, it is never strictly liable, as are all product manufacturers and product sellers. Second, it never pays punitive damages like everyone else. Third, it is never subject to a jury trial, which many people regard as a fundamental of our judicial process. Fourth, when plaintiffs lawyers sue the Federal government, their contingent fees are sharply limited to 25% in a litigated case and 20% when cases are settled; there is no such limitation against a private party. As a practical matter this means that if a lawyer had an opportunity to sue either a product manufacturer or the Federal government, the private manufacturer would be his or her target.

## The Over Expansion of the Discretionary Function Immunity

With all of these limitations on liability in place, the Federal government has an additional string to its defense bow - the "discretionary function immunity." Legislative history suggests that it was placed in the law so that Federal executives would not be deterred from exercising broad policy judgments: they were to be shielded from the apprehension that their actions would create tort liability for the Federal government.

I agree with this fundamental purpose. Unfortunately, the discretionary function immunity has been so broadly utilized as a defense in litigation that it is no longer attached to its basic roots.

For example, the Federal government has argued, successfully, that its decision not to warn uranium miners of the dangers of radiation was "discretionary." See Begay v. United States, 768 F.2d 1059 (9th Cir. 1985). It argued, successfully, that the Nuclear Regulatory Commission's failure to warn workers of possible radiation dangers and failure to adequately protect workers from radiation exposure were "discretionary." See Sizemore v. United States, 651 F. Supp. 463 (M.D. Fla. 1985). It argued, successfully, that its failure to warn about unsafe and unseaworthy conditions of a vessel it had inspected, its failure to require the proper repair of those conditions, and its failure to direct a prompt rescue mission were "discretionary." See Marine Coal Transport Corp. v. United States, No. 84 Civ. 5265 (ADS) (S.D. N.Y. 1985). It has argued successfully, time and again, that its negligent exposure of workers to asbestos, without adequate protection or instruction, was "discretionary." See Shuman v. United States, 765 F.2d 283 (1st Cir. 1985). I have included in an appendix a sample of shocking examples where the Federal government has utilized "discretionary function" to immunize itself from liability. In these situations a private party would not only have been liable, it probably would have had to pay punitive damages.

## Courts' Appreciation of "Discretionary Function" Overkill

Recently, some courts have recognized that the Federal government has attempted to extend the "discretionary function" immunity to unreasonable limits that are wholly unreasonable. Thus, the Supreme Court of the United States held that a Federal agency's failure to comply with its own mandatory standards or policies was not protected by the discretionary function exception. See Berkovitz v. United States, 198 S.Ct. 1954 (1988). S. 464 is intended to incorporate that decision into Federal law.

More recently, the First Circuit Court of Appeals held that the Government's negligent failure to warn workers of risks associated with exposure to asbestos dust was not "discretionary." See Dube v. Pittsburgh-Corning, 870 F.2d 790 (1st Cir. 1989). The court said that the Government had not exercised a policy judgment "not to warn," the Government had done simply nothing.

Curiously, the Department of Justice failed to appeal the Dube case. I say curiously because the Department of Justice has asserted S. 464 would cost "billions of dollars." The Berkovitz and the Dube decisions substantially overlap S. 464. If Dube would lead to "billions of dollars" of liability "as law," why did the Department of Justice not appeal it? In my judgment, there can be only two real answers. On one hand, the decision would not lead to billions of dollars. On the other hand, the Department of

Justice may have believed that the Supreme Court would affirm Dube. If that is true, why is the Department of Justice opposing incorporating Berkovitz and Dube into statutory Federal law?

S. 464 would take the Berkovitz and Dube decisions one additional fair and necessary step. It would subject the Government to liability when it has acted negligently and created health and safety risks in workplaces it owns, operates or has under contract. As we enter the 1990's, what value or social purpose could justify such wrongful actions?

## Department of Justice View of the Discretionary Function Exemption

The Department of Justice has been able to secure a decision contrary to Dube in the recent case of In re Joint Eastern and Southern Districts Asbestos Litigation, Doc. No. 89-6109 (2d Cir. 1989). It has, albeit grudgingly, accepted Berkovitz.

The Department of Justice's view about "discretionary function" as a whole is well set forth in its recently published monograph on the subject. This monograph is used, among other purposes, to instruct new Justice Department attorneys about how they are to use the "discretionary function" defense during their tenure of service at The Department. After discussing Berkovitz, the monograph says that the opinion:

> *. . .plainly suggests that if there is no Federal statute, agency regulation, or policy directive which imposed mandatory duties upon the federal agency or employee, then there will remain discretion, and the discretionary function exception should preclude jurisdiction under the FCTA.* See Discretionary Function

Exception Monograph, Torts Branch Monograph, Part II, p.7 (1988).

Let us think for a moment what this means. One could argue that if a mail truck driver was late in delivering mail, he might make a "discretionary decision" to go through a red light. He would not be violating any federal statute, agency regulation or mandatory duty. In point of fact, the "discretionary function" exception is now so open ended that it could be asserted almost any time the United States is sued. Again, the only situation where Justice acknowledges that it is inapplicable is when the government has violated one of its own laws.

Unfortunately, "discretion" is running wild. Some clarification with an appropriate balancing of interests is desperately needed. S. 464 will supply that clarification. Let me briefly discuss some of the principal arguments that have been raised against it.

## S. 464 Will Not Break the Federal Budget

The Department of Justices's principal argument against S. 464 is that it will be too expensive and cost billions of dollars. We do not believe this will occur. Let me share with you why this is the case.

First, S. 464 would not allow suits by Federal workers. Federal workers compose the overwhelming majority of those who were exposed to asbestos in World War II. Their claims still would be barred by the immunity shield that is contained in Federal Employees Compensation Act.

Second, S. 464 would not impose a duty on the Federal government to engage in any type of rescue effort or affirmative action where no such duty would be imposed on a private party. Thus, the government would not be responsible for rescuing hostages, or aircrash victims or helping victims of crime. The reason for this is that the Federal government's liability under the FCTA cannot be greater than would be imposed on "a private individual under like circumstances..." See 28 U.S.C. $ 2674.

Third, S. 464 would not create any new substantive rights for plaintiffs. Indeed, even now, plaintiffs envisioned by S. 464 may bring suits against the United States, but their recovery is not based on the merits of their case, but on whether the plaintiff can surmount the "discretionary function" hurdle. By removing the "discretionary function" exception from the Government's arsenal of defenses in cases arising from the Government's negligence in the workplace or its violation of its own health and safety standards, Congress would be enacting legislation, as I have indicated, that reflects recent trends in the case law, including the Berkovitz and Dube decisions.

Fourth, the FTCA specifically excludes any liability claims arising out of a postal matter, any claim caused by fiscal operations of the Treasury or by regulation of the monetary system or any claims for the activities of the Federal Land Bank. We would have no problems with adding appropriate language to make certain that S. 464 would not affect the liability of the Government with respect to economic activities of the FDIC, the FCC, or the Federal Trade Commission.

Fifth, S. 464 would not break the bank with asbestos cases. We have obtained statistical information from Chambers'

Associates, an organization that has complied data about asbestos personal injury cases. Based on that information, we can report the following:

- There will be approximately 124,000 asbestos personal injury cases pending by the end of 1989 (cases brought by persons who have suffered physical injury as a result of exposure to asbestos-containing products).
- Approximately 30 percent of the total pending cases involve persons who were exposed to asbestos-containing products in shipyards during World War II. The remainder of cases do not involve the Federal Government's use of asbestos and therefore, would not be affected by S. 464.
- It is estimated that almost 50 percent of those cases are brought on behalf of Federal Government employees who suffered personal injury as a result of exposure to asbestos-containing products. Those cases would not be covered by S. 464 because Federal employees cannot sue the Federal Government in tort law for workplace injuries.
- The other 50 percent of the shipyard cases were brought by employees at privately owned shipyards that were under contract with the United States Government. These cases would be covered by S. 464.
- There is a very small number of cases brought by persons who were not employees, but were exposed to asbestos carried out of the workplace and into their homes. There is no data available, however, on which to estimate the

number of these cases. These cases would be covered by S. 464.

Based on these statistics, approximately 15 to 18 percent of the 124,000 pending asbestos personal injury cases would be affected by S. 464.

## S. 464 Will Not Delay Cases

Some have argued that the enactment of S. 464 will prolong litigation. This is also not true. Let me share with you the reasons for this conclusion.

First, S. 464 will not permit workers or manufacturers to reopen suits which have been settled or litigated to judgement. Nor will it create a new statute of limitations under which a plaintiff (either a worker or manufacturer) may bring a claim against the government.

Second, a worker's claim against the government - unlike his claim against manufacturers - cannot be initiated by direct suit. Instead, under the FTCA, the worker must first file an administrative claim against the government agency he alleges is responsible for his injury. See 28 U.S.C. §2675 (a). If the Government denies the claim, or takes no action within six months, the worker may then file a court action against the Government. Thus, the worker's claim against the manufacturers and his claim against the Government proceed on different "tracks."

Third, the vast majority of actions by the manufacturers are for relief from the United States for damages sustained in workers' suits that have already been settled or litigated to judgment.

Finally, even if the Government were brought into a worker's case against the manufacturer, the worker's suit would not be adversely affected. Indeed, where such delay was likely, courts have severed the manufacturer's third-party actions against the Government from plaintiffs' underlying actions against manufacturers. The manufacturers settled or litigated plaintiffs' claims to judgment and then pursued their claims against the Government.

## The Legislation is too "Retroactive"

The legislation is not intended to resurrect "dead claims" or otherwise revive actions extinguished due to the running of any applicable statute of limitations. If language is necessary to clarify S. 464, we would be pleased to work with the Subcommittee to assure that result. S. 464 would permit the plaintiffs to file tort actions against the Government in cases which the applicable statute of limitations has not expired. In addition, in order to accord fair treatment and equity, the Government would be precluded from raising the "discretionary function" defense in pending actions. This would include contribution actions by manufacturers which are now pending against the Government. This, indeed, is fair.

Again, the type of conduct that is focused on is wrongful, negligent conduct. This is not a situation where a statute is redefining conduct in a way that makes "proper conduct." It is not as if a person were driving 55mph on a highway and subsequently were fined because the day after he drove on the highway the speed limit were changed to 45mph. S. 464 does not create a new tort for conduct that previously had been considered "proper."

Again, a good deal of S. 464 has been made law by the courts and they supplied the same retroactive scope as the proposal. Because of the complexity surrounding the retroactivity issue. We will be supplying a separate memorandum to members of the Subcommittee about that subject.

## What S. 464 Would Achieve

In plain, simple English, what S. 464 intends is this - make the Government responsible when it has negligently placed some other "purported" value above the health and safety of workers. It is not a bailout or a cop-out. It would clarify the "discretionary function" immunity and bring it back to its original moorings and purpose. S. 464 does not mean that the Government should always be liable when an injury occurs - only when it has engaged in negligent, wrongful conduct. If such liability were imposed, studies strongly suggest that the Federal Government would be encouraged to engage in safe behavior. Such encouragement is vital because there are no current criminal sanctions that can be imposed against the Federal government when it has risked injury to workers. In the long run, S. 464 should save millions of dollars because it will encourage safe non-negligent behavior by Uncle Sam.

In summary, the "billions of dollars" figure is a myth. S. 464 can preserve the discretionary function immunity's basic purpose; it can place limited, but necessary liability on the Federal government and not create a "run on the Treasury." I urge Members of this Subcommittee to support the legislation and would be pleased to work with you on its language so that it may effectuate its intended purposes.

# APPENDIX

## THE UNITED STATES GOVERNMENT IS ABLE TO AVOID LIABILITY FOR INJURIES CAUSED BY ITS NEGLIGENCE IN THE WORKPLACE

In the following cases, the United States Government escaped liability for injuries caused by its own negligence in workplaces it owned, operated, or had under contract. It did so by raising a legal defense called the "discretionary function exception." This defense is contained in the Federal Tort Claims Act. When Congress enacted the FTCA in 1946, it immunized the Federal Government from lawsuits involving activities that were "discretionary functions" of the government. Congress' intent was to protect the government from suits challenging its policy decisions. As the following cases illustrate, the Federal Government has successfully persuaded courts over the years to extend the "discretionary function exception" to protect ordinary acts of negligence by the U.S. Government in workplaces.

### 1. U.S. Government failed to warn uranium miners about hazards of exposure to radiation in mines.

Uranium miners brought an action against the United States seeking recovery for injuries sustained as a result of exposure to radiation in the mines. The miners contended that employees of the United States Public Health Service failed to warn the miners of the hazards of such radiation and were otherwise negligent. The Tenth Circuit held that because the decision not to advise the miners of the health risks was based on national security concerns, the discretionary function exception applied, immunizing the government from liability. Barnson v. United States, 816 F.2d 549 (10th Cir.), cert. denied, 108 S.Ct. 229 (1987).

### 2. U.S. Government failed to warn about dangers arising out of nuclear weapons testing.

Forty-three military and civilian participants who suffered injury from the U.S. atmospheric nuclear weapons testing program brought an action against the government and private contractors. They alleged that the government was negligent in that it failed to take adequate safety precautions and failed to warn them about the danger to which they had been exposed. An objective of the tests was to determine the effects of nuclear explosions on the equipment, clothing, weapons and fighting capability of military personnel. The court held that since the safety decisions reflected "policy judgments" which were left to discretion of the officials involved, the discretionary function exception barred the negligence claims. In addition, the court held the failure to warn claims were barred by the discretionary function exception because the decision whether to issue the warnings to "thousands of test participants of possibly life threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of government." In Re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), cert. denied, 108 S.Ct. 1076 (1988).

### 3. U.S. Air Force failed to apply safety requirements for employees of private contractor engaged in cleaning up fuel at an Air Force station.

Widow of an employee of a defense contractor brought a wrongful death claim against the U.S. The employee was at an Air force station, cleaning up solid fuel that had fallen to the bottom of a test silo from a missile test failure when the propellant ignited, killing the employee. The widow alleged that the Air Force was negligent and failed to comply with a Department of Defense Military Standard requiring that non-static clothing and non-sparking tools be used in the clean-up operation. The court held that the government was immune from liability under the discretionary function exception because an exercise of discretion was required in implementing the Military Standard and in determining the extent to which the government should review the contractor's compliance with the safety requirements. Totten v. United States, 806 F.2d 698 (6th Cir. 1986).

### 4. U.S. Government failed to warn employees of contractor about dangers of radioactive parts supplied by Government.

Four employees of an aircraft instrument manufacturing firm brought an action against the U.S. alleging that instrument parts painted with radium-226 and supplied by the government caused injuries including leukemia, lung cancer, and colon cancer. The employees alleged that the U.S. failed to adequately warn purchasers of the dangerous properties of radium-226. The court dismissed the employees' claims because the decision to use radioactive dials constituted an exercise of discretion by the government. Johnston v. United States, 597 F. Supp. 374 (D. Kan. 1984).

### 5. U.S. Government failed to monitor safety procedures of construction work performed by private contractor on Government building.

The survivor of a construction worker brought a wrongful death action against the U.S. and three companies, seeking damages for negligence. The decedent was handling a reinforcing bar while in the process of installing insulated metal siding on a building owned by the U.S. when the bar allegedly broke, causing the decedent to fall forty feet to his death. The court held the claim against the U.S. was barred by the discretionary function exception since discretionary policy considerations are involved in the decision not to monitor the daily safety procedures of the companies with whom the government contracts. Maltais v. United States, 546 F. Supp. 96 (N.D.N.Y. 1982), aff'd, 729 F.2d 1442 (2d Cir. 1983).

### 6. U.S. Government failed to warn employees of contractor performing road construction about presence of dioxin in road area.

Employees of a road construction company filed a complaint alleging that the U.S. Department of Housing and Urban Development ("HUD") improperly granted a block grant to a county for road repairs. The employees alleged that HUD and the Environmental Protection Agency were negligent in failing to warn the employees of the presence of dioxin in the work area, resulting in physical and psychological injuries. The Eighth Circuit, stating that the

U.S. had neither reached a conclusion regarding the presence of dioxin nor adopted a safety policy, held the claim was based on "a failure to exercise or perform a discretionary function" and was, therefore, barred by the discretionary function exception. Bacon v. United States, 810 F.2d 827 (8th Cir. 1987).

### 7. U.S. Government failed to warn employees at a nuclear power plant about dangers of exposure to radiation.

Survivors of pipe fitters who were employed by a nuclear power plant brought an action against the U.S. alleging the Nuclear Regulatory Commission ("NRC") was negligent in requiring or permitting the employees to work under hazardous conditions, failing to warn the employees before, during and after employment, and failing to protect the employees from exposure to radiation. The court held that because the NRC was engaging in regulatory activity, the discretionary function exception barred the claim. Sizemore v. United States, 651 F. Supp. 463 (M.D. Fla. 1985).

Senator **Heflin**. Professor Popper, you go ahead and then we will have questions.

## STATEMENT OF ANDREW F. POPPER

Mr. **Popper**. Thank you. I am honored to have this opportunity to address the subcommittee this morning, and ask that my statement be accepted into the record.

I have three children, and from time to time when I discipline them I think a reasonable translation of my admonition to them is do as I say, not as I do, particularly when I am telling them to go to bed at night. And when my children understand that I am asking them to do something I am unwilling to do, my effectiveness as a parent diminishes dramatically.

Workplace safety today puts the Federal Government in the position of telling the public, do as I say, not as I do. The record of the Government as an employer is not an admirable one. Regulatory and tort sanctions applied to virtually every significant employer in the United States do not apply when the employer is the U.S. Government.

When I look at S. 464, I do not see, first, in listening to the Justice Department statement and then in looking at the bill itself, a basis for concluding that there is going to be massive financial hardship imposed by this legislation.

Frankly, if the Government is involved in cognizable negligent behavior such that it would result in the imposition of millions, and now I hear billions of dollars in liability, something is so wrong, so fundamentally wrong with the way the Government acts that radical steps such as the imposition of liability are in order.

Those who defend the discretionary function exception defend the opportunity of the Government to behave in a negligent manner. The premise for the defense is, without the discretionary function exception, critical employees of the Government will not feel free to do their jobs.

To be sure, there is a behavioral limitation in this bill. It is the limitation prohibiting Federal employees from behaving in an unreasonable manner, jeopardizing public safety.

In a world where we have come to understand that command and control regulation is not the most effective way to accomplish health and safety objectives, the tort system provides a swift, efficient, and effective mechanism for upgrading the level of workplace safety.

You can spend years passing a rule and tens of millions of dollars passing an OSHA rule, and it won't have the impact of a single million-dollar judgment against a negligent employer. The tort system is a fundamental part of our health and safety system, but it is flawed and incomplete when it eliminates the Nation's largest employer.

There are shortcomings in this bill. I am not comfortable with the way it handles FECA. I am not feeling very easy about the way that it deals with joint and several liability; it doesn't, and I would like to keep that in, and keep it in fully. But those criticisms, I don't think are sufficient to offset support of the bill.

I don't think it will neutralize aggressive law enforcement unless our law enforcers are engaged in wholesale negligence. I don't think it will suddenly cause the Federal Government to pay for the wrongdoing caused by private employers. That is the function of joint and several liability.

The bill is likely to make the Government an aggressive enforcer of OSHA rules, and a partner with plaintiffs who are injured by employers who maintain an unsafe workplace. For too long the Federal Government has stood back and allowed the weak and the vulnerable in our society, the worker, to fight the monoliths in your society, their employers. This detached disinterest is objectionable. I believe it will be cured at least in part by the elimination of the discretionary function exception.

A few years ago, Paul Brodeur published an article in the New Yorker, actually a series of articles, in which he revealed to an absolutely astonished public that the asbestos industry had had notice of the carcinogenic dangers of asbestos for almost half a century.

I think the public would be interested to know how long the Federal Government knew of the dangers of asbestos in shipyards and in construction facilities, in housing, and in other areas where it proceeded. Eliminate the discretionary function exception and that kind of information will end up right where it belongs, in the hands of the American people.

And what will motivate them to use the Freedom of Information Act and to seek out that information? For better or worse, it will be the tort system. The tort system provides incentives to discover product risks. It provides incentives to manage and sometimes eliminate or reduce risks.

I have heard arguments, and I have read them today, that this exception will somehow interfere with the ability of the Government to make legislative choices, and will somehow turn the judiciary into the policymaking body intended to be our legislature.

I think the arguments are hollow; I think they are wrong. Is it good government if policymakers can, through the exercise of, quote, "discretion," create and maintain unsafe and destructive work environments, and thereafter be subject neither to regulatory oversight nor tort review? That doesn't seem to me to be good government.

Those who are negligent and who create unsafe work environments and those who violate safety standards hardly have a basis to demand the protection inherent in Federal immunity.

More to the point, those who are injured and defenseless by virtue of Government misconduct ought not be told that those who have caused their harm are somehow part of a special and protected class.

Thank you very much.

[The prepared statement of Mr. Popper follows:]

BEFORE THE UNITED STATES SENATE
COMMITTEE OF THE JUDICIARY
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

FEBRUARY 20, 1990

# TESTIMONY OF ANDREW F. POPPER
PROFESSOR OF LAW AND DEPUTY DEAN
THE AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

## STATEMENT IN SUPPORT OF SENATE BILL 464

ANDREW F. POPPER
Professor of Law and Deputy Dean
The American University
Washington College of Law
4400 Massachusetts Avenue, NW
Washington, D.C.  20016 (202) 885-2604

I am honored to have this opportunity to address the Subcommittee on Courts and Administrative Practice on S. 464, a bill to amend the Federal Tort Claims Act. I support the bill.

I have three children and, from time to time when I am involved in the act of disciplining my children, a reasonable translation of my admonitions would be: "do as I say, not as I do." When my children understand that I am asking them to do something I am unwilling to do, my effectiveness as a parent drops dramatically.

Workplace safety law today puts the federal government in the position of telling the public: "do as I say, not as I do." The record of the government as an employer, in terms of civil rights and worker safety, is not admirable. Laws that command fairness in hiring or retention were drafted to be inapplicable to the congress. Similarly, regulatory and tort sanctions applied to virtually every significant employer in the United States regarding worker safety do not apply when the work place is owned and operated by the federal government.

I will leave to Professor Victor Schwartz and others a recitation of the record of those situations where the federal government has slithered away from liability by virtue of the discretionary function exception. Suffice it to say that when I teach the Federal Tort Claims Act in my basic torts class, students are incredulous that the congress would provide a shield to liability and frustrate public accountability.

The regal concept of "sovereign" tied up in sovereign immunity no longer bears a relationship to the realities of our complex and commercially active federal establishment. I do not believe that there is any sound empirical basis for the assertions of the Justice Department that S. 464 will impose a massive financial hardship on our government. If the government is involved in cognizably negligent behavior such that the imposition of liability would result in millions of dollars of damages, something is so fundamentally wrong with the way the government acts that radical steps such as the imposition of tort liability are mandatory.

Those who defend the discretionary function exception defend the opportunity for the government to behave in a negligent and destructive manner. The premise for this defense is that without the discretionary function exception, critical employees of the federal government will not feel free to do their jobs. To be sure there is a behavioral limitation in this bill: it is the limitation prohibiting federal employees from behaving in an unreasonable manner jeopardizing the safety of innocent workers.

In a world where we have come to understand that command and control regulation is not always the most effective way to accomplish health and safety objectives, the tort system provides swift, efficient and effective mechanisms for upgrading the level of workplace safety and product safety. Years of regulatory efforts and many millions of dollars to promulgate a rule have nowhere near the impact of a million dollar judgement against a negligent employer.

I have not favored legislation proposed to dilute tort recovery nor do I favor S. 1400. I have come to the professional view that the tort system as implemented by the state and federal courts is a vital and fundamental part of the mix of remedies that provides for a safer environment for all of our citizens. That system is, by definition, incomplete when it eliminates from its reach the nation's largest employer.

There is work to be done on S. 464. The bill does not address federal employer compensation through FECA; it leaves open the question of joint and several liability for manufacturers, creating opportunities for considerable confusion; and frankly, I believe the discretionary function exception is wrong not just in the work place setting but in other areas as well.

The shortcoming in this legislation, however, does not suggest that the legislation is unworthy of support. It will not, as its critics contend, neutralize aggressive law enforcement; it will not, as its critics contend, cause the federal government to pay for the wrongs of negligent manufacturers who have jeopardized the lives of tens of thousands of workers; and it will not slow down the litigation process.

Given the effect of joint and several liability and contribution, this bill is likely to make the federal government an aggressive enforcer of OSHA rules and a partner with plaintiffs who are injured by employers who maintain an unsafe workplace. For too long the federal government has collaborated in the creation of risk and then stood back and allowed the most vulnerable in our society, the worker, to fight the monoliths of our society, their employers. This detached disinterest is objectionable, and will be cured by the prospect of federal liability.

When Paul Brodeur published his landmark work on asbestos in the New Yorker a few years ago, he revealed to an astonished public that the asbestos industry had information regarding the carcinogenic dangers of asbestos for almost half a century. The article demonstrates that it is quite possible for manufacturers to avoid liability by hiding data. It is not possible for the federal government to hide data, in most instances, due to the Freedom of Information Act.

The public would be interested to know how long the federal government knew of the dangers of asbestos in shipyards, in construction facilities, in housing projects and in other areas where the federal government made ready use of asbestos as a building product. Eliminate the discretionary function exception and that kind of information will end up just where it belongs: in the hands of the American public.

What will motivate the public to use the Freedom of Information Act to find out this type of information will be the possibility of tort liability. For better or worse, tort liability provides incentives to discover product and work place risks, and to manage, reduce or eliminate those risks. The system does not function, however, with the discretionary function exception in place.

It has been argued that eliminating the discretionary function exception will interfere with the ability of the legislature to make policy choices. The claim is that the judiciary, through the implementation of the Federal Tort Claims Act, will assume a legislative function. Such arguments pertaining to separation of powers seem hollow. Is it good government if policy makers can, through the exercise of discretion, create and maintain unsafe and destructive work environments and thereafter be subjected neither to regulatory oversight nor tort review?

Last fall the United States District Court for Nevada decided Roberts v. United States. (724 F. Supp. 778, 791(1989)) That case involves safety procedures used in nuclear test site operation. The court held that "a government agency or employee is not immune from scrutiny as a discretionary function" simply because it involves an element of choice. Immune from liability are choices rooted in social, economic or political policy. In contrast, " [i]f it is a choice to be exercised within established objective safety standards, and the plaintiff's claim negligence and failure to follow such standards, the discretionary function exception does not apply." (724 F. supp. at 791)

This notion of choices that are "grounded in social, economic or political policy" comes up in numerous Federal Tort Claims Act cases. The evolution of this escape clause to tort liability has already given the judiciary the opportunity to impose randomly tort liability in areas where government negligence has caused harm, even though there is arguably a discretionary function involved. One of the salutary effects of this bill will be to eliminate the judicial doublespeak now evolving, relieving courts of the obligation to split hairs regarding the kind of discretion involved, and instead focus on whether the behavior involved fails to comport with reasonable standards of care expected of all of our citizens.

The discretionary function exception forces courts to make distinctions between planning activity and the implementation of plans. For example, in Ritter v. United States Department of the Army, Corps of Engineers (874 F. 2nd 1236 (8th Cir. 1989)) the court found that the design and construction of a flood control system involved discretionary judgments that were within the protection of the discretionary function exception. However, implementation, operation, and maintenance of the project are outside of the discretionary function exception.

Such decisions protect offices within the government engaged in the planning process, and then penalize others within the government who implement those plans. Would it not be far better to impose liability for negligent maintenance, because those who were charged with the responsibility of maintaining were negligent, and to relieve liability from a planner, because the planning was not negligent, rather than to say as a matter of statute the planner is immune but the implementer can be liable.

In the United States v. Varig Airlines, (467 U.S. 797, 808 (1983)) the Supreme Court found that the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain government activities from exposure to suit by private individuals." In S. 464, the projected liability is for those activities involved in violating health and safety standards. It is hard to see how that type of misconduct falls into the area of concern of the Supreme Court.

Those who are negligent and create unsafe work environments and those who violate safety standards hardly have a basis to demand the protection inherent in federal immunity. More to the point, those who are injured and defenseless by virtue of government misconduct ought not be told that those who have caused their harm are somehow part of a special and protected class.

I appreciate the opportunity to have appeared before your Subcommittee today. Thank you very much.

Senator HEFLIN. Mr. Schwartz, basically, reviewing these cases in discretionary defense, they are mostly based on a failure to warn or failure to take action, which would be acts of omission rather than commission. Have we had any where there was affirmative commission in cases?

Mr. SCHWARTZ. There are some, and I will go through them and submit them to the committee. But most of them are situations where the Government had knowledge about a risk, and simply by informing the worker or providing him with an industrial mask, problems could have been avoided. But I will submit to the committee cases that maybe involved commission and an overt negligent act.

I should mention there is a curious overlap between recent case law and this bill. The first part of the bill deals with a violation of regulation. Now, the Supreme Court, in effect, held in *Berkovitz* that when the Federal Government violates one of its own regulations that it can't use the discretionary function exception, and that is the first part of the bill. It may need to be fine-tuned; there may need to be wording that would be changed.

The second part of the bill says in the workplace when the Government is negligent, they can't use the discretionary function exception to protect themselves. But, there you have the *Dube* case, which says if the Government has done nothing—has been passive, as you are suggesting, Judge—they cannot use the discretionary function exception.

The bottom line is that the case law, not completely, but is slowly catching up with where this bill is at already.

Senator HEFLIN. Senator Grassley.

Senator GRASSLEY. I don't have a question, but I would like to say that I agree with one thing that Mr. Popper said, and that is about Congress not exempting itself from laws. Along that line, I was successful for the first time in about 50 years having legislation that Congress normally exempts itself from applied to us, and that is the Americans with Disabilities Act, at least the way it has gone through the Senate so far, would apply to Congress. And I think that we would probably be more careful in the legislation we write if we did have it applicable to us.

Senator HEFLIN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Schwartz, do you believe from a policy standpoint that the U.S. Government, and ultimately the taxpayer, should be held liable as an insurer for accidents that occur in private workplaces? If so, why so, and to what extent?

Mr. SCHWARTZ. I don't believe that the Government should be held liable as an insurer. I think the Government should be held liable in workplace areas where it has either passively or actively been negligent; it has engaged in fault-based conduct.

For example, it knew of a risk that workers might die of radiation exposure, but it failed to inform workers that if they wore a mask or if they took other protection, they could avoid liability.

Insurer liability, Senator, means that a person is liable even though they may not be at fault. That actually occurs in the product liability area today in some States. Some manufacturers are liable even though they are not at fault, and it is called, in effect, insurer or absolute liability.

All I think is that when the Government is engaged in a behavior that, in standard case books of law, would be overt and complete fault-based conduct, negligence, then in a workplace setting they should be subject to liability; no more than that.

Senator THURMOND. Mr. Schwartz, with regard to S. 464 and its attempt to severely narrow the scope of the discretionary function exception to the Federal Tort Claims Act, from a compensation standpoint are individuals who are unable to sue the Federal Government under the current application of the discretionary function exception without a remedy? It is my understanding that these individuals may bring claims for workers compensation benefits and may file private tort suits against negligent manufacturers and suppliers. Could you please comment on these alternative theories of recovery?

Mr. SCHWARTZ. I will deal with worker compensation first. With worker compensation, the victim would receive a percentage of his economic losses, but no damages for pain and suffering.

In the private world, if somebody is hurt by negligence they obtain full recovery for economic losses and damages for pain and suffering, which may be substantial; somebody is blinded or there has been very serious personal injury.

Sometimes there are private individuals available. In asbestos, there have been a number of them, but we do see over the years the number of defendants that are available disappearing from the scene. A number of them have gone into bankruptcy.

There are some cases where there have been victims—obviously, the Department of Justice monograph is replete with them—where there was little or no worker compensation or there has been no viable entity to sue as a private defendant.

But in answer to your question, most of the time comp would be available. It is not a totally adequate remedy when somebody has been hurt by negligence. There are some situations where there is no private defendant available, and there may be more in the future.

Senator THURMOND. Mr. Schwartz, as currently drafted, S. 464 contains no effective date. If enacted, will this legislation be retroactive or prospective only? If retroactive, would it apply to pending asbestos cases, and if so, what effect will this have on litigation currently before the courts?

Mr. SCHWARTZ. I think that is an important matter to clear up in the legislation. The way it is drafted, I think it would apply to pending claims; no claims that have already been resolved or where the statute of limitations has expired, but it would apply to pending claims.

When tort rules are passed upon by courts—for example, when the Supreme Court of the United States decided *Berkovitz*, that applied to all pending claims, too. When changes have been made in tort law and they involve clearly wrongful decision, there is a limited degree of retroactivity.

We have worked out a paper describing the costs of retroactivity and the extent of it, and rather than burden the committee with a very long discussion of it now, I would be pleased to submit that paper to the committee.

Senator THURMOND. Mr. Schwartz, it is interesting to note that groups here today representing the injured citizens seem to oppose S. 464. That seems counterintuitive. How would you explain such a position?

Mr. SCHWARTZ. It is counterintuitive to me, too, although that word is a 5-dollar word, Senator. I guess they raised the price of a 5-dollar word from my time.

Their principal objective seems to be, and they can obviously speak for themselves, that this bill could cause delay in asbestos cases. I think that some of the groups that normally are thought of as protective of citizens' rights will let the committee know that they think it is a good idea to limit discretionary function.

But the principal concern seems to be delay. I think, legally, that the bill will not delay victims' rights, and I would work with those groups to try to overcome those particular concerns because, actually, what the bill does is remove a tremendous obstacle that is in the way of suit.

The Justice Department is now telling its young people that if the Government has not violated a mandatory law, it has discretion to act. And I cannot see how people who are representing victims would not want to work with those who want to change this obstacle in the law.

They have expressed concerns about delay. We are willing to work with them to overcome those problems because intuition and common sense says that the discretionary function immunity has gone way beyond its original moorings and hurt, not helped, victims.

Senator THURMOND. Professor Popper, I just have two questions, if you could answer them as quickly as you can.

Senator HEFLIN. There is a vote on.

Senator THURMOND. Professor Popper, in your opinion, would the addition of the Federal Government as a defendant delay the resolution of asbestos litigation?

Mr. POPPER. Of pending claims or new claims?

Senator THURMOND. Pending claims.

Mr. POPPER. Well, in my written testimony I have indicated that it is my opinion that it would not.

Senator THURMOND. Professor Popper, last question, some have characterized S. 464 as simply promoting workplace safety. Others see it as nothing more than a bailout of a particular industry hit hard by product liability lawsuits. What would be the practical effect of enacting S. 464?

It would appear that this legislation would simply shift the financial burden of these lawsuits from private manufacturers to the Federal Government. Does the financial burden of these lawsuits properly belong with the Federal Government? Why or why not?

Mr. POPPER. That sounds like an exam question, Senator. It is a wonderful question. I guess in terms of the shifting responsibility component of it, I don't see responsibility shifting in this case. I see responsibility being shared, and I think that that provides a greater basis, a greater depth for those victims groups that exist to secure their recovery.

I have very strong views on, for example, tort reform bills. I have great sympathy for and belief in——

Senator HEFLIN. We have got a vote on. If you can summarize in about 1 minute and answer it, but we are going to have to go to a vote.

Senator THURMOND. Can you finish in 1 minute?

Mr. POPPER. Yes. I think finding the U.S. Government as a defendant for negligent acts that it has committed benefits the public, and therefore I support the bill.

Senator THURMOND. Thank you.

Senator HEFLIN. Thank you. We have completed work with this panel. We will come back right after the vote for the last panel.

[Recess.]

Senator HEFLIN. The hearing will now come back to order. Mr. James Reed, legislative director, Asbestos Victims Campaign, Brookline, MA, and Susan Nial, Ness, Motley, Loadholt, Richardson, and Poole, of Charleston, SC, are our two witnesses.

Mr. Reed, if you will proceed.

## PANEL CONSISTING OF JAMES REED, LEGISLATIVE DIRECTOR, ASBESTOS VICTIMS CAMPAIGN, INC., BROOKLINE, MA; AND SUSAN NIAL, NESS, MOTLEY, LOADHOLT, RICHARDSON, AND POOLE, CHARLESTON, SC

### STATEMENT OF JAMES REED

Mr. REED. Good afternoon, Mr. Chairman and members of the subcommittee. My name is James Reed and I am appearing today on behalf of the Asbestos Victims Campaign, an educational and charitable organization incorporated in the Commonwealth of Massachusetts.

The purpose of our organization is to educate the general public regarding the plight of asbestos victims, and to provide other appropriate advocacy and support services, looking to the relief of this distressed group of citizens.

The strength of our movement derives from a grassroots coalition of thousands of asbestos victims and their families, members of the professional community, public officials, and organized labor, including key union officials as well as the rank and file.

It is a signal honor for us to be invited by this distinguished body to testify regarding S. 464. Our position, quite simply, is that S. 464 as presently drafted would, in effect, constitute an indirect bailout of the asbestos industry in regard to the billions of dollars in legal claims currently pending on behalf of 100,000 American citizens who have been poisoned by these notorious tortfeasors.

All of us know the names of these asbestos companies—Eagle-Picher, W.R. Grace, Pittsburgh-Corning, Owens-Illinois, Celotex—and their record of malfeasance and reckless misconduct is common knowledge.

This bill, Mr. Chairman, is for these companies. It effectively caters to their interests, though you might never guess this from all the attractive packaging in which the bill comes wrapped.

For this reason, we feel strongly that S. 464 is basically a Trojan Horse. Instead of being called the Government workplace safety bill, as some have dubbed it, we believe the bill would more accurately be described as the asbestos industry indirect bailout bill of 1990. But, of course, its effects would be the same under any designation.

But before describing those effects, Mr. Chairman, I would like to make it clear that we have no problem with the stated intent of this legislation, and we do not for one moment doubt that the Senators who have sponsored this measure are sincere in their devotion to the public interest. Yet, we do not believe that S. 464 is a good way to achieve those legislative objectives, and the unintended consequences, again, will be quite severe.

If the objective is to ensure safety in the Federal workplace, we can readily endorse the position advanced by our allies in organized labor that the Occupational Safety and Health Act be extended to the Federal workplace. If the objective is to clarify or perhaps to narrow the discretionary function immunity, that could be considered in a comprehensive review, not some wholesale gutting of the Federal Tort Claims Act.

And we strongly support targeted Federal relief for specific categories of claimants for injuries primarily or deliberately caused by the U.S. Government. I am thinking particularly of the nuclear radiation victims of the Southwest.

The reason why S. 464 would be so injurious to asbestos claimants, Mr. Chairman, is that it would inevitably advance the basic legal strategy of the asbestos companies and their insurers; namely, to shift or to diffuse liability wherever possible, but in any event to play for time to delay, delay, delay, and delay again. Delay, even more than getting off the risk, is, we believe, the very essence of their strategy and the motive of their behavior.

This matter of delay, Mr. Chairman, cannot be overstated. It is far and away the principal grievance of the asbestos victims as a group, many of whom are old and poor, without personal resources and lacking adequate services on the part of government at all levels—old men tied to their oxygen machines waiting for a lonely death from asbestosis or mesothelioma.

The asbestos victims as a group, together with their families and friends, cannot tolerate any additional delay for any reason whatsoever, and would inevitably view a vote for S. 464 as a vote of support for the asbestos company and a congressionally mandated delay of the victims' day in court. I am confident that our many friends and supporters in organized labor will have a similar reaction.

We therefore urge that S. 464 not be reported out favorably from this committee.

Thank you, Mr. Chairman, and with the permission of the Chair, I have a letter from the Sheet Metal Workers International Association which is addressed to this committee, and which was invited to appear before this committee at this table today. And with your indulgence, Mr. Chairman, I would read this brief letter. May I have the permission of the Chair?

Senator **Heflin**. How long is the letter?

Mr. **Reed**. The letter is about three paragraphs long.

Senator **Heflin**. Go ahead, sir.

Mr. **Reed** [reading]:

Dear Mr. Chairman, I regret that I am unable to be present to testify against S. 464. Unfortunately, this hearing conflicts with previously scheduled commitments related to the AFL-CIO winter meetings. These meetings have required the attention of others in the labor movement with a deep interest in this issue as well.

We oppose this bill because we think the users will be manufacturers and insurers who will pass on their product liability responsibility to the government, which will be financed by U.S. taxpayers.

We have documented many thousands of sheet metal workers with asbestos-related diseases, many of whom are seeking damages against the manufacturers. S. 464, as worded, will spell substantial relief for the manufacturers and their insurers, who, we anticipate, will in turn sue government agencies for recovery. Every ship, prison, school, hospital, and other facility built at the direction of the U.S. Government and which contains asbestos will become the taxpayers' burden."

Mr. Chairman, thank you for your indulgence. We will submit a statement for the record. Sincerely yours, Lynn McDonald, Special Assistant to the Sheet Metal Workers International.

That concludes my statement and the letter from the Sheet Metal Workers. Thank you, Mr. Chairman.

[The prepared statement of Mr. Reed follows:]

ASBESTOS VICTIMS CAMPAIGN
*an independent, nonprofit, advocacy group organized in the Commonwealth of Massachusetts*

Statement of James Reed, Legislative Director, Asbestos Victims Campaign, Inc.
Before the Subcommittee on Courts and Administrative Practice

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Committee on the Judiciary, United States Senate

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Hearing on S.464, a Proposed Amendment to the Federal Tort Claims Act

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Washington, D.C., February 20, 1990

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Good afternoon, Mr. Chairman and members of the Subcommittee. My name is James Reed, and I am appearing today on behalf of the Asbestos Victims Campaign, an educational and charitable organization incorporated in the Commonwealth of Massachusetts. The purpose of our organization is "to educate the general public regarding the plight of asbestos victims, and to provide other appropriate advocacy and support services looking to the relief of this distressed group of citizens." The strength of our movement derives from a grassroots coalition of thousands of asbestos victims and their families, members of the professional community who minister to their needs, public officials, and organized labor, including key union officials as well as the rank and file. It is a signal honor for us to be invited by this distinguished body to testify regarding S.464.

Our position, quite simply, is that S.464 as presently drafted would in effect constitute an indirect bailout of the asbestos industry in regard to the billions of dollars in legal claims currently pending on behalf of 100,000 American citizens who have been poisoned by these notorious tortfeasors. All of us know the names of these companies -- Eagle-Picher, W.R. Grace, Pittsburg-Corning, Owens-Illinois, Celotex -- and their record of malfeasance and outrageous misconduct is common knowledge.

This bill, Mr. Chairman, is for these companies. It effectively caters to their interests, though you might never guess this for all the attractive packaging in which the bill comes wrapped. As the Justice Department argued in recent testimony on S.464's companion bill in the House, "the asbestos industry and its insurers are attempting to shift to the taxpayers the industry's tort liability to tens of thousands of workers." And as the Sheet Metal Workers concluded at those very spirited hearings, the proposed legislation "will not achieve what is probably intended and instead will become a giant bailout for product liability." For these reasons, and for others to be detailed below, the Asbestos Victims Campaign feels strongly that S.464 is basically a Trojan Horse. Instead of being called the Government Workplace Safety Bill, as some have dubbed it, we believe that S.464 would be more accurately described as the Asbestos Industry Indirect Bailout Bill of 1990. But its effects would of course be the same under any designation.

Before describing those effects, Mr. Chairman, I would like to make it clear that we have no problem with the stated intent of this legislation, and we do not for one moment doubt that the Senators who have sponsored this measure are sincere in their devotion to the public interest. Yet we do not believe that S.464 is a good way to achieve those legislative objectives, and the unintended consequences, again, will be quite severe. If the objective is to insure safety in the federal workplace, we can readily endorse the position advanced by our labor allies that the Occupational Safety and Health Act be extended to the federal workplace. If the objective is to clarify or narrow the discretionary function immunity, that could be considered in a comprehensive review -- not some piecemeal gutting -- of the Federal Tort Claims Act.

Such a proceeding would inevitably consider the tangible impact of proposed legislation on specific categories of litigation, including the asbestos litigation. Again, if the legislative objective is to provide for targeted federal relief to specific categories of claimants for injuries primarily or deliberately caused by the United States Government -- I am thinking specifically of the nuclear radiation victims of the Southwest, whose cause we strongly support -- please give us a call; we would be delighted to testify on behalf of the injured parties. So we share much of the legislative intent of S.464, and do not mean to impugn the motives of any member of this august body. At the same time we realize full well that the asbestos companies are peddling a bill of goods.

The reason why S.464 would be so injurious to asbestos claimants, Mr. Chairman, is that it would inevitably advance the basic legal strategy of the asbestos companies and their insurers, namely, to shift or diffuse liability wherever possible, and in any event to play for time -- to delay, delay, delay, and delay again. Delay -- even more than getting off the risk -- is the very essence of their strategy and the motive for their behavior. The name of the game, again, is delay, for we are dealing here with large corporations and financial institutions for whom time is quite literally money.

Protracted delay in the asbestos litigation is obviously to the advantage of those corporations which can invest their billions for another few years at, say, a 13% annual rate of return, but it is devastating to those tens of thousands of citizens who are hoping to receive some kind of compensation before they die of asbestos-related disease. Of course many claimants die before they have their day in court.

This matter of delay, Mr. Chairman, cannot be overstated. It is far and away the principal grievance of the asbestos victims as a group, many of whom are old and poor, without personal resources and lacking adequate services on the part of government -- old men tied to their oxygen machines waiting for a lonely death from asbestosis or mesothelioma.

These people desperately need their day in court, and in many jurisdictions the wait is a long one. Those who are fortunate to reside in the northern district of Ohio, where Judge Lambros presides over the Ohio Asbestos Litigation Project (OAL), have timely access to justice. But those whose cases are in the federal district court for Massachusetts, where Judge Rya Zobel is responsible for the asbestos docket, typically wait at least seven years. This is a hideous situation, one so reprehensible that 12 out of 13 members of the Massachusetts Congressional delegation last year declared in a delegation letter to the federal court that its administration of the asbestos docket "does not meet the standards by which our system of justice must be measured." Two years of steady public and political pressure on the court at length resulted in appointment of a special master to study the situation, but in the interim no cases at all are moving in Judge Zobel's court. Mr. Chairman, Judge Zobel has not yet cleared the docket of asbestos cases filed in 1982. If a new administrative system for moving cases more expeditiously is not put in place in the next few months, I would venture to predict there will be a political explosion in Massachusetts. If administrative reform is not forthcoming , I would respectfully urge this Subcommittee to hold field hearings in Massachusetts to explore the situation fully.

Again, the Massachusetts situation may be an extreme case, but the importance that asbestos victims and their advocates throughout the country attach to speedy access to justice -- and prompt compensation -- is absolutely critical.

The asbestos victims as a group, together with their families and friends, cannot tolerate any additional delay for any reason whatsoever -- and will inevitably view a vote for S.464 as a vote of support for the asbestos companies and a Congressionall mandated delay of the victims' day in court. I am confident that our many friends and supporters in organized labor will have a similar reaction.

With the Subcommittee's indulgence, I belabor this matter of delay -- and the resulting universal confusion and uncertainty in the asbestos litigation -- because I believe that this would be the primary practical consequence of S.464.

In the few minutes I have left, let me explain how this would happen. First, a Congressional bailout of the asbestos industry, even if partial and indirect, would inevitably slow the settlement process (some asbestos companies have decided, quite sensibly, to settle rather than fight, cutting their losses) and any slowing of the settlement process would lead to further clogging of the court dockets. Second, S.464 would encourage and greatly facilitate a relatively new type of asbestos litigation, in which the asbestos manufacturers will figure as plaintiffs and the federal government is cast as defendant. In a grotesque reversal of historic roles, the asbestos companies have for some time now had suits against the federal government along the lines contemplate in S.464, and I would recommend that this Subcommittee familiarize itself with this growing body of litigation. Having by and large failed in the courts, the asbestos manufacturers are now coming to the Hill; but is there any good reason why the people's representatives should feel obliged to make their game any easier?

A third reason for the delay is that S.464 would result in more complexity and confusion. The bill itself is so vague in its language, and so deceptively simple in its appeal, that it seems calculated to take the courts a few years to figure out what it means and just exactly how it applies. Meanwhile, the asbestos defendants in the vast majority of pending cases will have a new defense in their legal arsenal and, of course, a new basis for time-consuming appeals. The precise scenario is impossible to predict, but this much is certain: there will be considerable additional delay in the asbestos litigation. By adding yet another layer or two of complication to this mass of litigation, which is already sufficiently complex in itself, the asbestos companies and their insurers will be able to push back the day of reckoning. Mr. Chairman, the asbestos victims of this country do not believe that this is in the public interest.

We would therefore urge that S.464 not be reported out favorably from this Subcommittee. There are alternative legislative strategies for insuring safety in federal workplaces and for clarifying or narrowing the discretionary function exclusion -- without threatening to wreck the asbestos litigation which already has enough problems of its own. And there are better ways to insure relief for toxic tort victims in situations where the federal government was the primary tortfeasor. If Subcommittee feels it must go forward with some version of S.464, the Asbestos Victims Campaign strongly recommends that the bill be made prospective with respect to the date of injury (necessary because of the long latency of asbestos disease) as well as the date of filing. We would be pleased to discuss specific legislative language with any member of this body.

Thank you, Mr. Chairman, for the opportunity to present the viewpoin of the asbestos victims. I will be happy to answer any questions.

JAMES REED, a consultant and a historian, is a principal organizer of the Asbestos Victims Campaign, Inc., a Massachusetts educational and charitable organization.

Born in 1945 in Walla Walla, Washington, James Reed holds a doctorate in American history from Harvard. He is a member of Phi Beta Kappa, was a Woodrow Wilson Fellow at Harvard, and is the author of The Missionary Mind and American East Asia Policy (Harvard, 1983).

James Reed was trained as a specialist in the management of professional firms, profession-based and nonprofit organizations, by the Institute of Management Consultants in New York. For more than ten years he has been president of Addis & Reed, Inc., management consultants, in Boston, and he has been active in the affairs of the consulting profession. In 1989 he was instrumenta in organizing two new nonprofit organizations in the Commonwealth of Massachusetts.

Senator **Heflin**. Ms. Nial.

## STATEMENT OF SUSAN NIAL

Ms. **Nial**. Thank you, Mr. Chairman. Members of the committee, and ladies and gentlemen, it is an honor to be here to discuss Senate bill S. 464. I am Susan Nial and I am an associate with the firm of Ness, Motley, Loadholt, Richardson & Poole, from Charleston, SC.

My firm represents approximately 16,844 asbestos victims. Many of these victims worked in shipyards refitting and repairing ships. During their employment, they were exposed to asbestos and subsequently developed asbestos-related diseases, such as asbestosis, lung cancer, and mesothelioma.

The most disturbing thing about this situation is that it could have been avoided if only the asbestos industry had come forward with the true facts about asbestos hazards, hazards which the industry was well aware of since the 1930's. But the asbestos industry chose profits over people, and big profits were indeed made.

Senate bill 464 does not mention a thing about asbestos. It is presented to you as a bill which seeks, and I quote, "to promote safety and health in the workplaces owned, operated, or under contract with the United States."

What it is, quite frankly, is one of the asbestos industry's attempts to get out from under the liability it rightfully bears for its decision to subject the workers of America to the hazards of asbestos.

The asbestos industry spokesman has stated in previous testimony that all the asbestos companies wish to accomplish is to have the Federal Government take on its fair share of its liability for asbestos-related diseases. I would like you for a moment to consider the actions of the asbestos industry regarding the dissemination of information regarding the health hazards of its products.

The asbestos industry controlled the content of and orchestrated the publication of almost all information regarding the hazards of asbestos. The asbestos industry interfered with, and in some cases brought to a halt further research on the link between asbestos and cancer.

When the Government wanted a high-temperature insulation, the asbestos industry wrote the specifications and provided the products, but failed to warn the workers of the dangers they faced while working with these products. When, in the late 1960's, the Government sought to remove asbestos from the products it purchased, the industry tried to discourage an asbestos substitution program.

Passage of this bill will open the door for the asbestos industry to revisit the issues of the Government's supervening negligence or superior knowledge which has long been decided against them. Excessive delay in the litigation will be caused—delay that will enable the asbestos manufacturers to put into motion their other liability avoidance vehicles of reorganization, divestment, leveraged buy outs, or bankruptcy. Delay will lessen the opportunity of asbestos victims to live long enough to be compensated for their losses.

I would like to ask you to take a look at this bill's supporters, the lobbyists who support the bill like Mr. Schwartz, whose law firm represents Eagle-Picher. Eagle-Picher was a significant player in the asbestos industry. Mr. Schwartz is joined by others representing other members of an interestingly named new lobby group called the Coalition for Equitable Compensation.

The coalition was created by former asbestos manufacturers such as Eagle-Picher, W.R. Grace, Pittsburgh-Corning, and Owens-Illinois. Far from being interested in equitable compensation, these corporations are interested in forcing the American public to pay for their conscious indifference to the safety and health of workers.

Recently, the Wall Street Journal reported that one major asbestos producer who is a defendant in many property damage cases spent over $40 million in defense, but only $23 million in settling cases and adverse verdicts. These same companies who now come to you talking about the discretionary function have asked to be relieved completely of their liability by claiming the protection of the Government contractor's defense.

This tack has been rather unsuccessful. In June 1989, a New York court held that the Government contractor defense was not available to them. Failing to win in court, these companies have come to the Congress under the guise of a concern for worker safety—this idea is far too late—to get the Government to bail them out.

I would like you to ask the representatives of the asbestos industry some questions to decide whether or not they are sincere in their interests. Ask, first of all, what their profits were for selling asbestos products to the Government. Ask the representatives of the asbestos industry if they will agree never to raise again the Government contractor's defense in any asbestos case.

Ask them if the asbestos industry will agree to limit the application of this law to all those accidents and diseases caused by exposures after this bill's enactment. Ask the representatives of the asbestos industry to explain to you why the American taxpayer should pick up the bill for their calculated deceit and outrageous misconduct.

Also, ask the representatives of the asbestos industry exactly how, by simply relieving the asbestos industry of its liability, this one-page bill will promote health and safety in the workplace.

The responsibility of a product manufacturer is clear. It should not put into the stream of commerce a product which will injure people. If a manufacturer chooses to do this, it should have to pay the price. S. 464 will relieve these asbestos manufacturers of that liability. Therefore, it should not be reported favorably by this committee.

I thank you for your kind attention. I will try to answer any questions you might have.

[The prepared statement of Ms. Nial (with attachment) follow:]

# STATEMENT

OF

SUSAN NIAL
ASSOCIATE
NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S.464

ON

FEBRUARY 20, 1990

Mr. Chairman, Members of the Committee, Ladies and Gentlemen. It is a honor to be here with you today to discuss Senate Bill S. 464. My name is Susan Nial and I am an associate with the firm of Ness, Motley, Loadholt, Richardson & Poole located in Charleston, South Carolina. My firm represents 16,844 asbestos victims. Many of those victims worked in shipyards refitting and repairing ships. During their employment, they were exposed to asbestos and subsequently developed asbestos-related diseases such as asbestosis, lung cancer and mesothelioma. The most disturbing thing about this situation is that it could have been avoided if only the asbestos industry had come forward with the true facts about asbestos hazards -- hazards which the industry was well aware of since the 1930's. But the asbestos industry chose profits over people, and big profits were indeed made.

Senate Bill S. 464 does not mention a thing about asbestos. It is presented to you as a bill which seeks "To promote safety and health in the workplaces, owned, operated or under contract with the United States". What it is, quite frankly, is one of the asbestos industry's attempts to get out from under the liability it rightfully bears for its decision to subject the workers of America to the hazards of asbestos.

The asbestos industry spokesman has stated in previous testimony that all the asbestos companies wished to accomplish is to have the federal government take on its "fair" share of its liability for asbestos-related disease. For a moment, I would like you to consider the actions of the asbestos industry regarding the dissemination of information regarding the health hazards of its products. The asbestos industry controlled the content of, and orchestrated the publication of, almost all information regarding the hazards of asbestos. The asbestos industry interfered with, and in some cases, brought to a halt further research on the link between asbestos and cancer.

When the government wanted a high temperature insulation, the asbestos industry wrote the specifications and provided the products but failed to warn the workers of the dangers they faced while working with the products. When in the late 1960's the government sought to remove asbestos from the products it purchased, the industry tried to discourage an asbestos substitution program. (A complete discussion of the asbestos industry conspiracy is provided as an Attachment to this statement.)

Passage of this bill will open the door for the asbestos industry to revisit issues of the government's supervening negligence or superior knowledge which have long been decided against them. Excessive delay in litigation will be caused. Delay that will enable asbestos manufacturers to put into motion their other liability avoidance vehicles of reorganization, divestment, leverage buyouts or bankruptcy. Delay will lessen the opportunity of asbestos victims to live long enough to be compensated for their loses.

Lets take a look at the bill's supporters -- the lobbyists who support this bill -- Mr. Victor Schwartz, whose law firm represents Eagle-Picher. Eagle-Picher was a significant player in the asbestos industry. Mr. Schwartz is joined by others representing other members of an interestingly named new lobby group called the "Coalition for Equitable Compensation". The Coalition for Equitable Compensation was created by former asbestos manufacturers like Eagle-Picher Industries, Inc., W.R. Grace & Co., Pittsburgh Corning Corp. and Owens Illinois, Inc.

Far from being interested in "Equitable Compensation", these corporations are interested in forcing the American public to pay for their conscious indifference to the safety and health of workers. The Wall Street Journal recently reported that one major asbestos producer, who is a defendant in over 200 property damage cases and thousands of personal injury cases, has spent over $40 million in defense of the property damage cases, yet only 23 million in the same period on settlements and payment of adverse verdicts. These very same companies have attempted to avoid liability completely for asbestos-related diseases in the past by claiming what is known as the "government contractor's defense" or the "government specification defense". This tack has been rather unsuccessful. For example, in June of 1989, a New York Court held that government contractor defense is not available to the manufacturers of asbestos products.[1]

Failing to win in court, these companies came to the Congress using the guise of a concern for "worker safety" to get the government to bail them out.

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[1] Weitzman v. Eagle-Picher, 542 N.Y.S. 118, 144 Misc.2d. 42 (1989).

Ask the representatives of the asbestos industry to tell you how much profit they made selling asbestos products to the government.

Ask the representatives of the asbestos industry if they will agree to the abrogation of the government contractor defense in all asbestos cases.

Ask the representatives of the asbestos industry to agree to limit the application of the law to all cases brought on the basis of occupational injuries or diseases which result from accidents or exposures after this bill's enactment.

Ask the representatives of the asbestos industry to explain why the American tax payer should pick up the bill for their calculated deceit and their outrageous misconduct.

Ask the representatives of the asbestos industry exactly how, simply by relieving the asbestos industry of its liability, this one page bill will promote health and safety in the work place.

The responsibility of a product manufacturer is clear. It should not put into the stream of commerce a product that will injure people. If a manufacturer chooses to do this, it should have to pay the cost of that decision. S.464 will relieve them of that liability, therefore, it should not be reported favorably by this committee. I thank you for your kind attention. I will be happy to answer any questions you may have.

SENATE.SP

SUSAN NIAL, an Associate with the firm of Ness, Motley, Loadholt, Richardson & Poole, born Pittsburgh, Pennsylvania. Admitted to the bar, 1986, Connecticut; 1987, New York. Education: University of Bridgeport (B.E.S. 1983); University of Bridgeport School of Law (J.D., Summa Cum Laude 1986). University of Bridgeport Law Review: Member 1984-86, Associate Editor 1985-86; Author: Clarifying Civil RICO: Sedima v. Imerex Co., Inc., 7 UBLR 189 (1986); Award for Outstanding Legal Scholarship 1984 and 1986, American Jurisprudence Award in Administrative Law 1984, American Jurisprudence Award in Uniform Commercial Code 1984, Phi Delta Phi, Who's Who In American Universities and Colleges 1986; Member: Grotius International Law Society 1983-84, Jessup International Moot Court Team 1985-86. Associate, Debevoise & Plimpton, New York, New York. (1986-1988); Law Clerk, Silver, Golub, & Sandak, Stamford, Connecticut 1985. Chairman, Board of Estimate & Taxation, Norwalk, Connecticut, 1980-82; Member: Board of Estimate & Taxation 1979-1985; Councilman, City of Norwalk, Connecticut 1977-79. Member: American Bar Association, New York City Bar Association, South Carolina Trial Lawyers Association; Member: South Carolina Bar.

Ms. Nial may be reached at NESS, MOTLEY, LOADHOLT, RICHARDSON & POOLE, 151 Meeting Street, Suite 600, P.O Box 1137, Charleston, S.C. 29402, phone (803) 577-6747.

**NIAL ATTACHMENT**

# THE ASBESTOS INDUSTRY CONSPIRACY

## Introduction

Many asbestos manufacturers were members of a number of asbestos industry trade associations including, inter alia, the Asbestos Information Association, Thermal Insulation Manufacturing Association, Asbestos Cement Products Association, National Mineral Wool Association, Magnesia Insulation Manufacturing Association, the Nation Insulation Contractors Association and Safe Buildings Association. These trade associations were the vehicles used collectively by asbestos industry members to disseminate misleading and false information which they knew to be false and influence public opinion and government bodies in order to protect their ability to sell asbestos. There was a great deal of overlap of membership in these associations. The asbestos trade associations interacted with other less formal groups of asbestos industry members by sharing information, research and the convening of formal meetings wherein representatives of one association would speak to members of another. This interaction was all in furtherance of the goals of the industry-wide conspiracy of suppression of information and misrepresentations about the hazards of asbestos.

## The Conspiracy

The liability of manufacturers of asbestos-containing materials is overwhelming. Although references to the hazards of asbestos exposure can be found in ancient Roman history,[1] the recognition of asbestos-related diseases arising from exposures in the modern workplace began at the turn of the century.[2] From that time forward, the response of the asbestos industry to the diseases produced by the use of their products was to "ignore and deny"[3] the existence of a disease problem or to suppress knowledge of the hazardous effects of exposure.

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[1] See B. Castleman, Asbestos: Medical and Legal Aspects (Law & Business, 2d Ed. 1987).

Manipulation of the data concerning asbestos-related diseases began with the first epidemiological study of asbestos manufacturing plants. In 1929, Dr. Anthony J. Lanza, Associate Medical Director for Metropolitan Life Insurance Company, began a study of the incidence of asbestosis among asbestos manufacturing workers of several companies, including Johns-Manville and Raybestos-Manhattan.[4] Although the examination of the workers and dust counts was completed by January 1931, publication of the final report was delayed until 1935. The reason for the delay in publication was the interception and the editing of the report by asbestos company officials and lawyers. In 1934, Dr. Lanza sent a galley proof of his article to Vandiver Brown, secretary and general counsel of Johns-Manville, who passed it along to outside counsel for Johns-Manville, George Hobart.[5] In correspondence between Hobart and Brown, Hobart explained that the New Jersey

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[2] *See* Exhibit 1276, Bibliography prepared by Dr. David Ozonoff. Exhibits referred to herein are contained in the Exhibit Volume provided to the Committee's Staff.

[3] Exhibit 296, Report of Dr. Thomas Mancuso to the Philip Carey Manufacturing Company on September 23, 1963.

[4] *See* Castleman at 136-42.

[5] *Id.* *See* also Exhibits 15 and 21.

Legislative Commission was considering the addition of silicosis to the list of occupational diseases under the New Jersey compensation law. Hobart worried that asbestosis might also be recognized as a compensable disease:

> [W]e have consistently urged that there is a substantial difference between silicosis and asbestosis... and...we have urged that asbestosis should not at the present time be included in the list of compensation diseases, for the reason that it is only within a comparatively recent time that asbestosis has been recognized by the medical and scientific professions as a disease - in fact, one of our principal defenses and actions against the company on a common law theory of negligence has been that the scientific and medical knowledge has been insufficient until a very recent period to place upon the owner of plants or factories the burden or duty of taking special precautions against the possible onset of the disease to their employees.[6]

Vandiver Brown indicated that Dr. Lanza should include in his study the conclusion that "clinically, it (asbestosis) is a type (of disease) milder than silicosis."[7] Brown also sent a copy of Hobart's three-page letter to Dr. Lanza, asking that the contents be given "your most serious consideration."[8] When the study appeared in 1935, the conclusion suggested by Brown appeared just as the counsel for Johns-Manville had suggested.[9] Thus, compensability of asbestosis as a disease under workers' compensation laws was delayed by years.

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[6] Exhibit 207, letter from Hobart to Brown, December 15, 1934.

[7] Exhibit 206, letter from Brown to Lanza, December 10, 1934.

[8] Exhibit 208, Letter from Brown to Lanza, December 21, 1934.

[9] See Castleman at 141-42.

Data from industry-sponsored studies were not only manipulated, but knowledge from other sources was suppressed by company officials. In 1935, a trade journal known as "Asbestos" suggested the publication of recent English medical information concerning the British experience with asbestos disease.[10] The editor of Asbestos magazine wrote to Sumner Simpson, the president of Raybestos-Manhattan, and prefaced her request to publish information on the hazards of asbestos with the following:

> Always you have requested that for certain obvious reasons we publish nothing, and naturally your wishes have been respected.[11]

Sumner Simpson corresponded with Vandiver Brown about the request for publication of this information. Simpson acknowledged that the journal had been "very decent about not reprinting the English articles" on asbestosis, but stated that:

> The less said about asbestos, the better off we are.[12]

Vandiver Brown replied on October 3, 1935:

> I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity.[13]

In 1936, a number of companies agreed to support confidential studies about the hazards of asbestos to be performed by the

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[10] Exhibit 205, Letter from Rossiter to Simpson, September 25, 1935.

[11] Id.

[12] Exhibit 22, Letter from Simpson to Brown, October 1, 1935.

[13] Exhibit 23, Letter from Brown to Simpson, October 3, 1935.

Saranac Laboratory, an institution that conducted experimental studies on the effects of industrial dusts. Contributors to this study included Johns-Manville, Raybestos-Manhattan, United States Gypsum, Thermoid Company (H.K.Porter), and the predecessor to Abex.[14] The studies were performed by Dr. Leroy Gardner, who, at that time, was one of the world's leading experts on pneumoconiosis.

In 1943, Dr. Gardner reported a most startling finding: nearly eighty-two percent of the laboratory animals exposed to asbestos developed lung cancer.[15] This finding was secretly conveyed to Vandiver Brown of Johns-Manville, who then conveyed it to executives of the other companies that sponsored the study. Several years later, the study remained unpublished and Dr. Gardner died unexpectedly.

Dr. Arthur J. Vorwald, an experimental pathologist, took over as the head of the Saranac Laboratory, and he attempted to put the study by Doctor Gardner into monograph form. Dr. Vorwald noted the finding by Gardner of an excess incidence of lung tumors, but it was deleted after pressure by the sponsoring companies to exclude the finding from the final report.[16]

On November 11, 1948, the executives from the sponsoring companies met at the Johns-Manville board room to discuss how the final report of Vorwald should read. Brown later reported that "it was the unanimous opinion that the reference to cancer and tumor should be deleted and this is a point we will insist upon..."[17] At the meeting was Dr. Lanza, Associate Director for Metropolitan Life, who wrote to Dr. Vorwald and told him that the reference to cancer should be removed from the study and that a conclusion as to the non-progressive nature of the disease of asbestosis should be included. Vorwald dutifully excluded the reference to cancer, and the final published report made no reference whatsoever to the existence of lung tumors.[18]

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[14] Exhibit 214, Saranac Agreement.

[15] Exhibit 393, "Monograph on Asbestosis", February 23, 1943.

[16] Exhibits 3965 and 3970, Letter from Lanza to Vorwald, January 14, 1948.

Shortly after the November 1948 meeting, Dr. Lanza became the Director for the Institute of Industrial Medicine at New York University. In 1949, Dr. William E. Smith was hired by Dr. Lanza to take responsibility for cancer studies at the Institute. In 1950, Dr. Smith travelled to England and learned that the incidence of lung cancer was increased among British asbestos workers. After his return to America, Dr. Smith proposed experimental studies to determine if asbestos was a carcinogen. Additionally, Dr. Smith showed Dr. Lanza a letter from Dr. John Knox, Medical Director of Turner and Newall in England, which recited data on the excess incidence of lung cancer among the workers at the Rochdale facility of Turner and Newall. Dr. Lanza's only response was "a vehement denunciation of cancer investigators as 'troublemakers'."[19]

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[17] Exhibit 3960.

[18] _See_ Exhibit 3970.

[19] _See_ Deposition of Dr. William E. Smith, taken on March 29, 1979. (Copies of relevant portions of this deposition can be provided to members of this committee upon request.)

Shortly thereafter, funding for Dr. Smith's studies was cancelled, and his position was usurped by Dr. Norton Nelson at N.Y.U. Dr. Smith was then terminated. Dr. Smith later testified that Dr. Lanza believed cancer studies caused problems for the asbestos companies and their insurers for which he consulted. On June 28, 1954, Dr. Smith wrote to Dr. Lanza as follows:

> When the director of the Saranac Laboratory (Dr. Arthur J. Vorwald), who had spent years on the study of asbestosis and other forms of pneumoconiosis, discovered that an industrial dust caused cancer in the lungs of animals inhaling it, and when he applied for a grant to pursue his studies, then, in the summer of 1953, he stated to me in the presence of Dr. Goldstein and Dr. Nelson that you had utilized you position on the Board of the Damon Runyan fund to reject his application, that you utilized your position on the board of the Saranac Laboratory to force his resignation, that you claim to have subsequently prevented him from getting a job at the medical school in California by going personally to call upon the dean of that school. I wish to inquire who paid for your trip to California.[20]

Although no one has yet established who paid for Dr. Lanza's trip to California to ensure that Dr. Vorwald was not hired by the university to which he applied, it is certainly a matter of inference that Dr. Lanza did not finance his own trip.

Indeed, Dr. Vorwald had become a thorn in the side of asbestos companies. In the early 1940's, Dr. Vorwald's predecessor, Dr. Gardner, had agreed to study the health effects of an asbestos insulation material, Kaylo, which was manufactured by Owens-Illinois. After Dr. Gardner's death, Dr. Vorwald continued the investigation into the health hazards of Kaylo. On December 16,

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20. Id.

1948, Dr. Vorwald wrote to Mr. U.E. Bowes of Owens-Illinois and informed him that Kaylo produced asbestosis in laboratory animals. He further stated:

> I realize that our findings regarding Kaylo are less favorable than anticipated. However, since Kaylo is capable of producing asbestosis, it is better to discover it now in animals rather than later in industrial workers. Thus the company, being forewarned, will be in a better position to institute adequate control measures for safeguarding exposed employees and protecting its own interests.[21]

Despite this warning, a warning did not appear on the product "Kaylo" until the mid-1960's.

Johns-Manville, however, proposed placing a warning label on its bags of asbestos fiber as early as 1952. The warning was to read as follows:

> CAUTION - ASBESTOS FIBER
>
> INHALATION OF ASBESTOS FIBRE OVER LONG PERIODS MAY BE HARMFUL. MATERIALS SHOULD BE SO USED AS NOT TO CREATE DUST OR, IF THIS IS NOT POSSIBLE, EMPLOYEES SHOULD BE EQUIPPED WITH ADEQUATE PROTECTIVE DEVICES.[22]

Arthur Fisk, counsel for Johns-Manville, wrote to Dr. Lanza, the apologist for the asbestos industry and its insurers, to inform him of the warning. Dr. Lanza approved the wording of the warning, but stated that users of asbestos products should not be at a great risk for pneumonoconiosis.[23] Thus, in 1952, Dr. Lanza was erecting the first state of the art distinction between asbestos manufacturing workers and product users. Needless to say, it was not until 1964 that a warning appeared on asbestos-containing products, and the distinction between asbestos manufacturing employees and product users was once again artificially drawn.

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[21] _See_ Exhibit 231.

[22] Exhibit 4144, Letter from Fisk to Lanza, February 20, 1952.

[23] Exhibit 4145, Letter from Lanza to Fisk, March 5, 1952.

In 1957, the concern over cancer was once again raised by the industry. A cancer study was proposed to the Asbestos Textile Institute on the incidence of lung cancer among asbestos workers. This proposal was soundly rejected by the members of the Asbestos Textile Institute on the basis that such a study would "stir up a hornet's nest and put the whole industry under suspicion."[24] A study was published a year later on the incidence of lung cancer among Quebec asbestos miners. That study concluded that there was no excess incidence of lung cancer among those exposed to asbestos dust. Deleted from the published report was a critical finding of the study contained in the confidential draft that workers with asbestosis were at a greater risk for the development of lung cancer.[25] Therefore, not only were the authors of the study guilty of "statistical acrobatics"[26] in the mathematical calculation of cancer among asbestos-exposed workers, but the critical finding that workers with asbestosis would contract lung cancer was suppressed.

The following asbestos manufacturers were members of the trade association known as Quebec Asbestos Mining Association (Q.A.M.A.):

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[24] See Exhibit 25.

[25] See Exhibit 1293.

[26] See deposition of Dr. Thomas Mancuso, taken in September 1983. (Copies of the relevant portions of this deposition can be provided to members of the committee upon request.)

Johns-Manville Corporation; Carey-Canada, individually and as successor to Quebec Asbestos Corporation; Jim Walter's alter ego, Celotex, successor to Quebec Asbestos Corporation; National Gypsum Company; Flintkote Company and Turner & Newall, individually and successor to Bell Asbestos. These conspirators, members of Q.A.M.A., participated in the above-described misrepresentation of the work of Dr. Leroy Gardner published by Arthur Vorwald in the AMA Archives of Industrial Health in 1951 through its member Johns-Manville and through the close monitoring of the editing of Gardner's report by Q.A.M.A.'s representative, Ivan Sabourin, acting on behalf of all Q.A.M.A. members.[27]

Asbestos manufacturers who were members of the Q.A.M.A. as described above, began on or about 1950 to formulate a plan to influence public opinion about the relationship between asbestos and cancer by influencing the medical literature on this subject and then touting and disseminating this literature to the public and to organizations and legislative bodies responsible for regulatory control of asbestos with the specific intent of misrepresenting the existing scientific information and suppressing contrary scientific data in their possession and control.

This plan of misrepresentation and influence over the medical literature began on or about 1950 when the aforementioned Q.A.M.A. members selected Saranac Laboratories to do an evaluation on whether cancer was related to asbestos.[28] After a preliminary report authored by Arthur Vorwald in 1952 indicated that a cancer/asbestos relationship might exist in experimental animals, these Q.A.M.A. members refused to further fund the study and it was terminated and never publicly discussed.

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[27] Exhibit 3967, Letter from Vandiver Brown to Sabourin.

[28] Exhibit 13057.

As a result of the termination of this study, these asbestos manufacturers fraudulently withheld information from the public and affirmatively misrepresented to the public and responsible legislative and regulatory bodies that asbestos did not cause cancer, including affirmative misrepresentations by conspirators' agents K.W. Smith, M.D., Paul Cartier, M.D., A.J. Vorwald, M.D., A.J. Lanza, M.D., Vandiver Brown and Ivan Sabourin, said misrepresentations being directed to inter alia, U.S. Government officials, Canadian government officials, U.S. National Cancer Institute, other medical organizations and the general public, including the plaintiffs.

Subsequently, the Q.A.M.A. members contracted with the Industrial Hygiene Foundation and Dr. Daniel Braun to further study the relationship between asbestos exposure, asbestosis and lung cancer. In 1957, Drs. Braun and Truan reported to the Q.A.M.A. that asbestosis did increase a worker's chances of incurring lung cancer.

The Q.A.M.A. members thereafter caused, in 1958, a publication of the work by Braun and Truan in which the findings regarding increased incidence of cancer in persons with asbestosis was edited out by agents of the Q.A.M.A. The published version of this study contained a conclusion that asbestos exposure, alone, did not increase the incidence of lung cancer,[29] a conclusion known by the conspirators to be patently false.

By falsifying and causing publication of studies concluding that asbestos exposure did not cause lung cancer and simultaneously omitting a documented finding that asbestosis did increase the risk of lung cancer, these Q.A.M.A. members affirmatively misrepresented to the public and concealed from the public the extent of risks associated with inhalation of asbestos fibers.

In approximately 1958, these Q.A.M.A. members publicized the edited works of Drs. Braun and Truan at a symposium in an effort to fraudulently misrepresent to the public and persons exposed to asbestos that the inhalation of asbestos dust would not cause cancer.

The fraudulent misrepresentations beginning in 1946 as elaborated above and continuing with the publication of the 1958 Braun/Truan study influenced the standards set for threshold limit values for development of such standards to fail to lower the threshold limit value because of a cancer risk associated with asbestos inhalation.

In 1967, Q.A.M.A. members determined at their trade association meeting that they would intentionally mislead consumers about the extent of risks involved in inhalation of asbestos products.[30] In order to implement that decision, position papers were written, one for college educated readers and one for the general public.[31]

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[29] Exhibit 13194, Letter from Sabourin to Braun, dated December 30, 1957.

[30] Exhibit 13282.1(b), Minutes of Q.A.M.A. meeting and related Public Relations Committee report dated August 10, 1967.

In 1952, a Symposium regarding the health effects of asbestos was held at the Saranac Laboratories. The following asbestos industry members were in attendance: Johns-Manville, Turner & Newall, Raybestos-Manhattan, and Q.A.M.A. members by way of their agents, Cartier, Sabourin and LaChance.[32]

At this meeting, the occurrence of lung cancer and asbestosis in product users was discussed and the carcinogenic properties of all fiber types of asbestos was also discussed. In an affirmative attempt to mislead the public about the extent of health risks associated with asbestos, and in an effort to fraudulently conceal those risks from the public, these defendants conspired to prevent publication of the record of this 1952 Saranac Symposium and it was not published. In addition, the asbestos industry members induced Vorwald not to announce the results of his and Gardner's animal studies showing excess cancers in animals which thereby fraudulently misrepresented existing secret data which could not be publicized owing to the secrecy provisions contained in the 1936 Saranac agreement heretofore described.

The following asbestos manufacturers were members of the Magnesia Insulation Manufacturers Association: Philip-Carey Corporation (predecessor of Jim Walter/Celotex) and Johns-Manville.

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[31] Exhibit 13282.1(a).

[32] Exhibits 70 and 71.

In 1955, these companies caused to be published the MIMA 85% Magnesia Insulation Manual. This manual falsely and fraudulently misrepresented that asbestos-containing products offered no hazard to workers who use these products.

The following asbestos manufacturers were members of the trade organization known as the Asbestos Textile Institute (ATI): Raybestos-Manhattan, Johns-Manville, H.K. Porter, Keasby & Mattison, individually and through its alter-ego Turner & Newall and National Gypsum.

In 1947, the members of the ATI, received a report from W.C.L. Hemeon regarding asbestosis, which suggested re-evaluation of the then-existing threshold limit values for asbestos exposure. The members of the ATI caused this report not to be published and thereby, fraudulently concealed material facts about asbestos exposure from the public and affirmatively misrepresenting to the public and class of persons exposed to asbestos that the existing threshold limit value was acceptable. Thereafter, these companies withheld additional material information on the dust standards from The American Conference of Governmental Industrial Hygienists (ACGIH), thereby further influencing evaluations of threshold limit values for asbestos exposure.

In 1953, National Gypsum, through its agents, in response to an inquiry from the Indiana Division of Industrial Hygiene regarding health hazards of asbestos spray products, refused to mail a proposed response to that division indicating that respirators should be worn by applicators of the products. National Gypsum's response distorted and fraudulently misrepresented the need for applicators of asbestos spray products to wear respirators and fraudulently concealed from such applicators the need for respirators.

In 1955, Johns-Manville, through its agent Kenneth Smith, caused to be published in the AMA Archives of Industrial Health, an article entitled "Pulmonary Disability in Asbestos Workers." This published study materially altered the results of an earlier study in 1949 concerning the same set of workers. This alteration of Dr. Smith's study constituted a fraudulent and material misrepresentation about the extent of the risk associated with asbestos inhalation.

In 1955, the National Cancer Institute held a meeting at which Johns-Manville and A. Vorwald affirmatively misrepresented that there were no existing animal studies concerning the relationship between asbestos exposure and cancer, when, in fact, the asbestos industry was in secret possession of several studies which demonstrated that positive evidence did exist.

In 1957, these members of the ATI, jointly rejected a proposed research study on cancer and asbestos and this resulted in fraudulently concealing from the public material facts regarding asbestos exposure and also constituted an affirmative misrepresentation of the then-existing knowledge about asbestos exposure and lung cancer.

In 1964, the members of the ATI met to formulate a plan for rebutting the association between lung cancer and asbestos exposure that had been recently discussed by Dr. Irving J. Selikoff. Thereafter, these members of the ATI embarked upon a campaign to further misrepresent the association between asbestos exposure and lung cancer.

On March 5, 1968, Cliff Sheckler, manager of Occupational and Environmental Control of Johns-Manville, met with members of the Sprayed Mineral Fiber Manufacturers Association (SMFMA) to teach them the ". . . J.M. approach" to handling adverse publicity about the harms and hazards associated with asbestos exposure. Members of SMFMA were U.S. Mineral Products Co., Keene Corp., Asbestospray Corp., Smith & Kanzler (Celotex Corp.). Johns-Manville too was a member for a time. SMFMA was formed to counter adverse publicity being generated about the spray-on fireproofing industry.

In 1970, the Celotex Corporation and Carey-Canada, affirmatively misrepresented that it had been in the asbestos business since 1918 and found no reported conditions of asbestosis or lung disease. This constituted a fraudulent misrepresentation about the material facts known to these companies.

In 1963, The Philip Carey Manufacturing Company hired Dr. Thomas Mancuso to study the incidence of asbestos-related disease among its manufacturing employees. At the end of his one year contract, Dr. Mancuso reported to Philip Carey that not only were its employees at risk, but the users of its products were in danger of developing both asbestosis and pulmonary cancers.[33] Dr. Mancuso stated in his final report that the asbestos industry had long recognized the hazards of asbestos, but chose to "ignore and deny" their existence. Needless to say, Dr. Mancuso was terminated by Philip Carey.[34]

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[33] Exhibit 259, Letter from Cantlon to Pechstein dated December 10, 1963.

In 1964, when Dr. Irving J. Selikoff finally brought the health hazards of asbestos exposure among product users to the public's attention, the Asbestos Textile Institute was trying to create ways to "rebut" his study.[35] When it became obvious that the companies were to be forced to warn of the hazards, one company, Eagle-Picher, reluctantly put a warning on its products, but in such language so as not to "shout warning from the rooftops."[36] Some companies, including Pittsburgh Corning and Raybestos-Manhattan, waited until as late as possible to place warnings on it products. Pittsburgh Corning, the manufacturer of an asbestos insulation material that contained almost ninety-five percent amosite asbestos, did not warn until 1969, and Raybestos-Manhattan, a manufacturer of asbestos cloth, did not warn until, at the earliest, 1972. In 1972, the United States Government mandated warning labels on product in which use of the products would generate dust in excess of the threshold limit value for asbestos.

Indeed, in 1971, Dr. Joseph Goodman, a medical consultant for Raybestos-Manhattan, was labeling Doctor Selikoff as a "dangerous man", and at a meeting of the Asbestos Textile Institute, the members were discussing ways to suppress Dr. Selikoff's open discussion of the hazards of asbestos.[37]

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[34] Exhibit 296, "Philip-Carey Occupational Health Program" by Dr. Thomas Mancuso.

[35] See Exhibits 340, 342, 344.

[36] See Exhibits 1433-36.

In 1970, the Asbestos Information Association ("A.I.A.") was formed. Its purpose was to address asbestos-related health issues from a public relations standpoint.[38] In 1973, Matthew Swetonic, public relations representative for the A.I.A., gave a speech before the Asbestos Textile Institute in which he chronicled the efforts of the A.I.A. to influence public opinion and government regulation. While admitting the hazards of asbestos exposure, Mr. Swetonic expressed satisfaction that the A.I.A. had altered what he described as its limited concept of proper function from "providing accurate unbiased information on asbestos and health" to assuming "whatever activities and responsibilities it deems necessary to protect the interests of the asbestos manufacturing industry in the United States, vis-'a-vis, asbestos-health".[39]

In discussing the reason the A.I.A. was needed by the industry, Swetonic stated that no one company acting independently could get the results needed in terms of public or governmental relations.[40]

Mr. Swetonic's speech is an indictment of the A.I.A. and the industry as it lays bare the intensity and ferocity of the industry's army at those who dared try to protect the public by disseminating information about the hazards of asbestos. Dr. Selikoff, a prominent and respected researcher in the area of employment relative to asbestos disease is referred to as a man "with clouded thinking"[41] who manipulates scientific data to cater to a sensational press. Mr. Swetonic expressed satisfaction, however, in what he termed the "good news" that "very few people have been paying attention".[42]

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[37] See Exhibit 1254.

[38] Exhibit 1, A.T.I. General Meeting Minutes, Swetonic Speech.

[39] Exhibit 1, A.T.I. General Meeting Minutes, Swetonic Speech.

[40] Id.

At the time of this speech, Mr. Swetonic was authorized to speak for the A.I.A.[43] This speech was made during the course of the conspiracy and discusses the actions taken by the A.I. A. in furtherance of that conspiracy.

Celotex Corporation misrepresented the medical hazards of asbestos as well as the safety of its in-place asbestos-containing building products through its participation in the A.I.A. and the Safe Buildings Alliance ("SBA"). AIA members used this organization to suppress and minimize the public perception of the dangers of asbestos. For example, in its booklet, "What You Should Know About Asbestos and Health," A.I.A. knowingly misrepresented asbestos products as safe by stating: "Currently marketed asbestos products are not hazardous when properly handled or used."[44]

To this day, the A.I.A. is active in attempting to influence government regulation of asbestos use. On July 7, 1989, the E.P.A.

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[41] Id.

[42] Id.

[43] Deposition of Matthew Swetonic, June 7, 1988. (Copies of the relevant portions of this deposition can be made available to members of the committee upon request.)

[44] Exhibit 1371.

announced a ban on the use of asbestos. The A.I.A. described the rules as "draconian" and said that they would eventually force asbestos companies to stop producing asbestos products. Kenneth Nyquest, counsel for A.I.A. stated that the group was contemplating a law suit to challenge the regulations.[45] The decision to file the law suit was publicly announced to the nation and press on August 22, 1989 by B.J. Pigg of the A.I.A.[46]

The SBA was organized for similar reasons as the A.I.A. The euphemistically named Safe Building Alliance consists of Celotex, National Gypsum, U.S. Gypsum and W.R. Grace. The SBA has been found to be the "alter-ego" of its member companies.[47] In the mid 1980's, the SBA mailed over 45,000 copies of a booklet entitled "What You Should Know About Asbestos and Buildings" to various building owners. The booklet contained various misrepresentations and false or otherwise inaccurate statements which minimized the problems of asbestos building contamination.[48] The SBA's major goal is to sufficiently reassure building owners that their buildings are "safe" -- thereby discouraging asbestos abatement -- so that by the time later renovations or ultimate demolition is undertaken, the building owner will have found that he has waited too late and the statute of limitation will bar suit.[49]

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[45] Exhibit 13282.1(d), '"E.P.A. to Ban Virtually All Asbestos Products by '96", The New York Times, July 7, 1989, page 8.

[46] Source of the information is a news report on CNN News on August 22, 1989 at 8 P.M.

[47] Exhibit 915(a).

[48] Exhibit 1372(PD).

## The Asbestos Industry and The Government

The factual context of the transactions between the United States Government and the asbestos industry is hardly one wherein the government controlled the industry. In fact, depositions of a number of asbestos industry and governmental officials indicate the exact opposite.

The asbestos products sold to the government for installation in ships and other governmental structures were not designed by the government nor were they produced strictly for governmental use. These products were already being widely sold by the asbestos industry to non-government consumers. In fact, many members of the asbestos industry have specifically denied that their products were manufactured to conform to military specifications. See, for example, Answers to Interrogatories filed by H. K. Porter Company in 1981. In answer to Interrogatory No. 16, H. K. Porter stated:

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[49] The National Emissions Standards for Hazardous Air Pollutants ("NESHAPS") 40 C.F.R. 61 *et seq*. requires that any time 160 sq. ft. or more of asbestos-containing material is disturbed -- such as by renovation, maintenance, or demolition -- special and expensive precautions must be taken in order to assure the safe and separate removal of the asbestos-containing material. Thus, it is not a question of *if* a building owner has to remove the asbestos, but rather *when* it must be removed. The SBA has tried to convince building owners that it is perfectly safe and prudent to do nothing until ultimate demolition, or perhaps until some much later scheduled renovation work is to be performed. Of course, what SBA does not tell building owners and the recipients of its booklets is that the statutes of limitation will most likely bar their suits by then. Thus, typically, if a plaintiff sues to recover costs for asbestos removal before demolition or renovation, a defendant will argue plaintiff has sued too soon; however, if a plaintiff waits until a planned renovation or demolition takes place, then defendants argue that plaintiff waited too late.

> No changes were made in asbestos products or packaging to conform to military specifications. The asbestos products manufactured by these defendants met military specification without change as did the packaging. The products herein involved were subject to broad general use, one of which was military. (Emphasis added.)[50]

The industry recognized that the government would be a good source of stable profit and strove to convince the government to use its products. Members of the industry participated in the development of and, in many cases, actually wrote the specifications the government used to purchase asbestos or asbestos-containing products. In a deposition taken on November 5, 1980 of Mr. John Haas, Chairman of the Ships Specifications Control Board of the United States Navy, Mr. Haas stated that the specifications were written to conform to commercially available products.[51] The government exercised no control over these specifications because it did not have the experience or expertise to do so and it had a totally cooperative industry ready, willing and able to do the job for it.

The government was primarily interested in performance - that is the ability of the product to efficiently perform under certain conditions. The industry provided products to do just that and the government accepted the industry's description of these products and called them specifications.[52] Further support can be found for this contention in the deposition of John Hawkins, of manufacturer Raybestos-Manhattan, dated March 11, 1985 at pages 69-70 and the minutes of the Asbestos Textile Institute ("ATI") Technical Committee dated September 11, 1947.[53]

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[50] A copy of H.K. Porter's Answers is provided as Exhibit 11.

[51] A copy of the relevant section of Mr. Haas' deposition is provided as Exhibit 2.

[52] See the Declaration of Joseph H. Chilcote, dated July 9, 1981 and provided as Exhibit 3.

In sworn depositions Mr. Marion Oliver, Mr. John Hawkins and Mr. Milton Scowcroft of Raymark testified, in essence, that the asbestos industry:

1. developed the products for commercial use;
2. sold them to commercial consumers before their sale to the government;
3. offered the products to the government as the answer to the government's need for insulation and other heat resistant materials;
4. aided the government in writing purchase orders, styled as specifications, for products already available a s commercial goods; and
5. the only decision the government really made vis a vis these products was to buy them.[54]

In effect then the government virtually bought the asbestos products "off the shelf" or "out of stock". The specifications were the government's way of quoting a "stock number", if you will, for the purchase of a commercially available good which the industry convinced the government would fulfill the government's needs.

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[53] Pages 1 & 2 are provided as Exhibits 4 and 5, respectively. See also a letter from J.A. Bettes of Raybestos-Manhattan, Inc. to the Office of the Quarter-Master General dated June 26, 1957, provided as Exhibit 6.

[54] Copies of the relevant portions of the depositions of Mr. Hawkins, Mr. Oliver and Mr. Scowcroft are provided as Exhibits 4, 7 and 8 respectively.

In light of the history of the drafting and revision of governmental specifications, it is no wonder that the former president of Eagle-Picher, Herman Huelster, stated in testimony in Hawaii that governmental specifications were "creatures of the industry". Indeed, when the government in the late 1960's sought to remove asbestos from the products which it purchased, the industry tried to discourage an asbestos substitution program. In a letter dated May 28, 1969, Mr. M.Q. Scowcroft of Raybestos-Manhattan stated to Mr. E. A. Schuman of Johns-Manville that: "We feel it expedient to submit a letter prior to June 15th in order to contribute to discouraging a development program on substitutes for asbestos in shipboard insulation."[55] Nor is not surprising that in Plas v. Raymark Industries, Inc., No. C 78-9 (N.D. Ohio, April 22, 1983) (unreported opinion), the Honorable John M. Manos ruled: "The evidence that I heard is that Raybestos-Manhattan invented the material which they sold to the Government, they worked with the Government on specifications, and the material they sold to the Government was the same material they sold to the private sector motion [to strike the defense of governmental specifications is] granted".[56]

When the government purchased asbestos cloth or other asbestos related products, it was acting as a mere consumer, albeit a very large consumer. It exercised no more control over the content of those products than does the average grocery shopper over the contents of a can of beans.

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[55] Mr. Scowcroft's letter is provided as Exhibit 9.

[56] Court's Ruling on Government Specifications, Transcript of Proceedings, dated April 22, 1983, provided as Exhibit 10.

## Conclusion

The history of the asbestos industry's reaction to knowledge concerning the dangers of asbestos exposure is a sordid one. It is one of the suppression of critical knowledge about the hazards of asbestos and the consequent epidemic of m asbestos-related disease resulting from the industry's conspiracy of silence. That conspiracy is a continuing one is clear from the continuing efforts of asbestos manufacturers to lobby hard for less stringent regulations and their continued export of asbestos and asbestos-containing products to the world.

Senator **Heflin**. I understand that your focus today has been on asbestos victims. In your opinion, does the scope of this bill go beyond the scope of individuals who may have been injured by asbestos? How far do you see this bill potentially reaching?

Ms. **Nial**. I think that is one of the major problems with this bill. I think it has an enormous and broad reach, not only in the fact that it has retrospective impact, but also that it is not, it seems to me, a studied change in the Federal Tort Claims Act. There may be some academic arguments to narrow the discretionary function exception, but I do not think they have been treated correctly in this bill.

Mr. **Reed**. Let me just add to that, Mr. Chairman, that I think before we start talking about liability, we ought to get some basic legislation in place to ensure safety in the Federal workplace. I don't think any of us know how far reaching this can be, and that is part of the problem.

The bill, as presently drafted, will probably take the courts years to interpret and apply in particular cases, and those years will mean that much more delay not only for asbestos victims, but for litigants of other types.

I think, as a nonlawyer looking at this, the language seems to me to be very loose and calculated almost to absorb a great deal of judicial time in deciding exactly what it means.

Senator **Heflin**. Ms. Nial, would the cases that have been held on failure to warn and failure to take certain action under the discretionary defense—would this bill have the effect of opening up those areas in which sovereign immunity could not be used as a defense?

Ms. **Nial**. I think we already have areas in which courts have determined that if you do not have a discretionary action by the Government that they are not protected. So I don't think from that point of view we are going to have a problem with that.

The definite problem with this bill is that it would open up litigation that is already set in motion. It would add the Government as a defendant. It would bring in complex issues of what they call sharing and what we would view as apportionment, which is not the typical way liability is managed in the courtroom.

We have joint and several liability. Professor Popper brought that up. That is one of the complex areas that this bill has not dealt with. The retrospective impact is another issue that I think is a problem.

Senator **Heflin**. Thank you. The record will be kept open for other statements and questions if any members of the committee want to submit questions to any of the witnesses that have testified today.

We have statements from Senator Bond, Representative Bill Gradison, and Joe G. Hollingsworth from Spriggs & Hollingsworth which we will enter into the record at this point.

[The statements of Senator Bond, Mr. Gradison, and Mr. Hollingsworth follow:]

## STATEMENT OF THE HONORABLE CHRISTOPHER S. BOND
## OF MISSOURI

## BEFORE THE SUBCOMMITTEE ON COURTS & ADMINISTRATIVE PRACTICE
FEBRUARY 20, 1990

Mr. Chairman, members of the committee, I would like to thank you for holding a hearing on this important piece of legislation, and, for giving me the opportunity to comment on it.

This is a very important bill. It says that when the federal government violates its own health or safety regulations or is negligent in workplaces it owns, operates or has under contract, then the injured victim has the right to present a claim in court. Unfortunately, under current law the federal government is able to escape liability when it has been negligent in its workplaces by arguing that its actions in failing to warn workers about dangers or in exposing workers to dangerous materials without adequate protection or instructions were discretionary. The government is able to do this because of the "discretionary function" liability shield, an ambiguous provision in the Federal Tort Claims Act passed by Congress in 1946.

The discretionary function exception was designed to preclude lawsuits against the federal government challenging policy decisions, such as legislative or regulatory actions. Its purpose is to prevent courts from second-guessing legislative and executive policy decisions. Over the years, the federal government has obtained judicial opinions broadening the discretionary function exception to immunize itself from liability for its decisions not to warn workers about dangers in the workplace or to expose workers to dangerous materials without adequate protection or instructions. The unfortunate result has been that thousands of American citizens and their families have twice been victims: once devastated as a result of government negligence; and second, left to twist in the wind when the government later invoked the discretionary function liability shield to avoid compensating victims for their claims.

The bill which is before the committee today is simply an effort to re-establish the federal government's responsibility for the safety of its employees. It would codify a recent U.S. Supreme Court decision, Berkovitz v. United States, which held that a federal agency's failure to comply with its own safety standards is not protection under the discretionary function exception. In addition, S. 464 would build upon a recent opinion of the United States Court of Appeals for the First Circuit, Dube v. Pittsburgh-Corning, which held that the federal government's failure to warn workers of the risks associated with exposure to asbestos dust is not the type of conduct that Congress intended to shield from liability. S. 464 would have the result of removing the discretionary function shield when the government has violated its own safety regulations or when it has been negligent in a workplace it owns, operates or has under contract, thereby giving the injured person a fair opportunity to prove in court that the federal government is liable for damages under the applicable tort law.

Mr. Chairman, this bill is aimed at restoring simple fairness to the government-citizen relationship. Not only does it ensure that an individual will have a fair opportunity of being compensated when injured by the government, but it also ensures that an employer will not have to bear the entire burden of liability when its co-defendant happens to be the federal government.

I would like to point out that this bill does not open the doors of the U.S. Treasury for tremendous payments to claimants. What it does is open the judicial system to people with the legitimate grievances, giving them a fair opportunity to make their case in a court of law.

I urge the members of the committee to approve this bill and I thank you again for the opportunity to provide comment.

# Statement of the Honorable Bill Gradison
# of Ohio

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Senate Subcommittee on Courts and Administrative Practices

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Hearing on Government Observation of Safety and Health Standards

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February 20, 1990

Mr. Chairman and members of the subcommittee, I welcome the opportunity to submit for the record my views on problems arising from federal immunity in tort cases and their effect on the government's observation of safety and health standards. Senators Sanford and Bond have introduced legislation, S. 464, to clarify the obligation of the federal government for some torts. As the author of the House companion bill, H.R. 1095, I believe this legislation is a just response to these problems where cases of occupational health and safety are concerned.

As you know, in recent years there has been considerable controversy and litigation concerning the role of the federal government in the unnecessary exposure of citizens to risks associated with a number of health and safety hazards in the workplace. In numerous instances, there is considerable documentation of negligence on the part of the federal government.

For example, in cases involving exposure to asbestos, which currently are most at issue, it has been documented repeatedly that the federal government violated its own health and safety standards in the period during and immediately after the Second World War, and that it failed to warn, or provide protection for, workers in government and contract shipyards. The courts have found that government officials and safety inspectors were aware of the hazards associated with exposure to asbestos and of the dangerous conditions in the shipyards under their control.

Unfortunately, citizens pursuing their cases in the courts have found that the federal government can escape any liability for violating its own health and safety standards by exercising a technical legal defense. By invoking immunity under the discretionary function defense provided under section 2680(a) of title 28, United States Code, the federal government effectively is able to avoid responsibility.

The discretionary function immunity was provided to the federal government by Congress as part of the Federal Tort Claims Act (FTCA) of 1946. Essentially, the defense of discretionary function was written into the FTCA to immunize the federal government against suit by citizens for decisions made by high level officials in the course of conducting public policy. Congress intended that this protection would allow principal government policymakers to conduct an effective public policy without fear of being sued for the ramifications of its policy judgments.

The broad intention of Congress to protect the federal government in its ability to conduct public policy is easily discernible in legislative history. What is not so easily discernible is precisely how this immunity should be applied and what its boundaries are. Several recent judicial decisions highlight the imprecise nature of the scope of federal responsibility for some torts and the problems for citizens seeking redress through the courts.

In 1984, a federal district court, in the case of *Shuman v. United States*, found that the government had negligently caused the injury and death of a man, exposed to asbestos dust, who worked in a contract shipyard in 1942 and from 1950 to 1953. The court ordered the government to pay damages to his widow. On appeal, the First Circuit Court overturned the decision, not on the merits of the case, but on the grounds that the government was able to immunize itself from liability. Private concerns, in similar cases, have been found liable and ordered to compensate plaintiffs.

In 1988, the Supreme Court considered the case of *Berkovitz v. United States*. In spite of the discretionary function defense offered by the government, the Court unanimously held that the government was partially liable when the Food and Drug Administration wrongfully approved an oral polio vaccine for release to the public. The Court, while recognizing that the government could be insulated from liability in selected cases when its actions and decisions involve an element of choice and are based on public policy considerations, determined that the government could not immunize itself when it had violated applicable health and safety standards.

In *Dube v. Pittsburgh-Corning Corporation*, a federal district court found that the government was partially responsible for the death of Joan Dube, who contracted a fatal disease from exposure to asbestos dust through the clothing of her father, who had been employed in a shipyard owned and operated by the Navy. The court ruled that the government had acted negligently, yet also held that the government was not liable for any damages due to the discretionary function immunity. In a decision earlier this year, the First Circuit Court, which earlier had issued the *Shuman* decision, overturned the decision. The First Circuit ruled that the failure of the government to make a decision about whether or not to warn a worker, and hence his family, about a dangerous situation was not covered by the immunity.

The precedents set by these cases seem to indicate that the federal courts are moving cautiously to place reasonable limits on the discretionary function immunity. The courts appear to be growing impatient with the use of this defense by the government not to protect high level policy decisions from challenge in the courts but to save the government embarrassment and money. Yet, in spite of this effort by the courts, there is lingering uncertainty over the limitations of this immunity.

In my view, the federal government should not be able to hide from its responsibilities in this area. The scope of the discretionary function defense needs to be clarified. S. 464 would make it possible for citizens who are injured as a result of the government's violation of occupational health and safety standards, or by negligence in workplaces under its control or supervision, to seek to recover damages for those injuries.

I want to stress that the legislation makes no judgment about the merits of the cases currently pending before the courts or that may be brought in the future. It does not provide automatically for compensation. It merely asserts the principle that the government must defend itself successfully against a charge that it acted negligently. If the government did not act negligently, I am certain the courts will recognize that fact. However, if the government did act in a negligent fashion, it is irresponsible, unjust, and unacceptable for the federal government to absolve itself of any responsibility for actions that affect the health and safety of workers.

Whether it be in the shipyards of the 1940s and 1950s, the nuclear facilities of today, or other hazardous working environments of the future, a decision not to warn workers of hazards, or negligently ignoring health and safety standards, cannot be condoned. There is a justifiable reason for the discretionary function immunity, but recent history tells us that it has been distorted by the government well beyond the protection for decisions of high policy for which it was intended.

S. 464 does not rewrite the discretionary function immunity and would not interfere with the legitimate discretion the government must have to make and conduct public policy. It would, however, clarify responsibility for negligence at any workplace owned by, operated by, or under contract with the government.

Of additional importance, Mr. Chairman, is that the bill would expand rights for a class of people that heretofore have had their legitimate rights denied. Under current law, in tort actions involving violations of health and safety standards in workplaces covered by S. 464, if the injured party is a member of the military or a federal employee, that individual has recourse to compensation under federal workers compensation systems. An individual who falls into neither of those categories does not have recourse to compensation under current law and finds that his attempt to sue is blocked by federal immunity.

I am not proposing changes in any aspect of the system except to provide for an establishment of a right to seek compensation, if the case can be proven, for those who currently fall through the cracks. Furthermore, I believe the costs of this bill would be much more modest than you are likely to hear from some of its critics.

Several factors mitigate against burdensome costs to the government. First, the class of people affected by this proposal is limited. Second, the standard set up by the bill is negligence, which is far more difficult to prove than strict liability. Third, damage awards would continue to be assessed by a judge, rather than a jury, which the evidence shows tends to limit the amount of damage awards. Fourth, the bill would provide a needed incentive for the government to maintain a safe working environment. This negative inducement exists in the private sector. There is no legitimate reason for its exclusion from the public sector.

I am not formally trained in the law, Mr. Chairman, but I am told that there is an old maxim among/tort law specialists that says "if you do not commit any torts you do not have to pay anything." In the end, this bill is an encouragement for responsible behavior.

One may question why this bill is necessary given the significant precedents of the Berkovitz and Dube cases. If those precedents are logically applied, over time the problem may take care of itself. On the other hand, it may not. Particularly because these are not constitutional issues, one should not rely on stare decicis nor should we be content with the expectation that justice will eventually filter its way through the system. The discretionary function immunity needs to be refined to respond to contemporary realities and expectations of justice. Only the Congress can provide for a change in current law, by codifing the Berkovitz and Dube decisions and filling in the missing pieces, that will assure its even application by the courts.

I believe that S. 464 is an appropriate refinement. Over one hundred and fifteen of my House colleagues and 16 Senators, on a bipartisan basis, agree with that assessment. This hearing and the hearing the House Subcommittee on Administrative Law conducted last November are indicative of the seriousness with which this problem is viewed.

In 1780, Edmund Burke wrote that "bad laws are the worst sort of tyranny." The FTCA is not a bad law and the intention of the discretionary function immunity is understandable. However, those citizens who have had the misfortune to be the victim of federal negligence and who cannot win restitution, even when the facts agree with them, must certainly feel otherwise.

We have a responsibility to act. Congress has responded in the past to the requirements of justice by scaling back the absolute immunity enjoyed by the federal government. The government has accepted responsibility for, among other things, the consequences of atomic testing, the distribution of the polio vaccine, and for the internment of Japanese-American during the Second World War. In this tradition, I urge this subcommittee to support this modest, but much needed, refinement to the Federal Tort Claims Act.

# STATEMENT OF

JOE G. HOLLINGSWORTH
SPRIGGS & HOLLINGSWORTH
WASHINGTON, D.C.

BEFORE THE
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
OF THE SENATE JUDICIARY COMMITTEE

February 20, 1990

Mr. Chairman, Members of the Subcommittee, I am submitting this Statement in support of S.464 on behalf of Eagle-Picher Industries, Inc. Eagle-Picher is a former manufacturer of asbestos-containing insulation cement. Today Eagle-Picher is fighting for its corporate survival. Eagle-Picher seeks nothing more than its day in court.

I am a partner in the law firm of Spriggs & Hollingsworth. We represent Eagle-Picher in litigation asserting claims against the United States under the Federal Tort Claims Act ("FTCA"). By these claims, Eagle-Picher seeks contribution and/or indemnification from the United States on the grounds that the federal government is directly responsible for the personal injuries suffered by tens of thousands of shipyard workers employed in the construction and repair of U.S. vessels at government shipyards and government-controlled private shipyards during World War II and thereafter.

Eagle-Picher has made some progress in the litigation. Indeed, after a federal district court in Maine finally allowed Eagle-Picher the opportunity to present its evidence of the government's negligence, the United States Court of Appeals for the First Circuit held in Dube v. Pittsburgh Corning Corp. that the government was liable to Eagle-Picher and other manufacturers for failing to warn a shipyard worker and his family of the potential hazards of "household" exposure to asbestos fibers. As ordered by the court, the government has now issued a check to Eagle-Picher and other manufacturers to pay for its share of the responsibility for the injuries suffered by one person injured as a result of the horrendous working conditions in government-owned shipyards. This victory over the government vindicates Eagle-Picher's many years of effort to get even one court in the nation to hear its case on the merits. However, technical and procedural legal difficulties remain.

## The Need For A Legislative Solution

The need for a legislative solution to redress the fundamental inequities of the asbestos liability situation has never been greater than it is today. Some otherwise successful companies have had to lay off workers, deprive stockholders and communities of reasonable expectations, or even seek refuge under federal bankruptcy laws. Others carry an incredible financial burden, hoping only that government will soon face its responsibility for the asbestos crisis. For example, the asbestos-related suits filed against Eagle-Picher have recently forced the company to:

- increase its unfunded liability on the balance sheet by $459 million, thus eliminating the shareholders' equity;
- suspend the dividend on the Company's common stock, a

dividend which had been paid for 48-1/2 years; and

sell three operating divisions which contributed $110 million in sales to 1988 results.

And for the workers injured by exposure to asbestos -- many of whom are most in need of legal redress -- much of the money otherwise available for compensation is consumed by lawyers' fees and transaction costs.

S.464 would provide a legislative solution in the context of workplace injuries by blocking the government's access to the so-called "discretionary function" exception to the FTCA. The FTCA provides that district courts -- which have jurisdiction over tort claims against the United States -- are to apply the principle that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." However, the discretionary function exception to the FTCA exempts from judicial scrutiny "[a]ny claim based upon . . . exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government . . . ." Thus, the discretionary function exception precludes courts from treating the government as though it were a private party under like circumstances.

Indeed, the discretionary function exception to the FTCA is so hyper-technical that federal courts responsible for determining the applicability of the exception to challenged acts of the government have struggled to determine precisely what kind of government conduct properly falls within the exception. One court, after searching the case law for a standard that might govern the applicability of the exception, determined that, "[r]ather than a seamless web . . ., we found the law in this area to be a patchwork quilt." Blessing v. United States, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978), quoted in Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989).

Although the Supreme Court's decision in Berkovitz v. United States, 486 U.S. 531 (1988), and the First Circuit's decision in Dube, supra, have narrowed somewhat the application of the discretionary function exception, S.464 would eliminate the uncertain "patchwork quilt" application of the exception in two instances -- where injuries arise from the government's violation of its own health and safety standards or its negligence in the workplace. Simply put, S.464 would permit the establishment of government liability where the plaintiff -- manufacturer or shipyard worker -- can prove that his injuries resulted from the government's negligence. In short, S.464 would permit plaintiffs like Eagle-Picher to have their day in court and enable them to confront the government on a level playing field.

## The Government's Responsibility

Eagle-Picher seeks to recover damages from the United States for the government's role in exposing shipyard workers during World War II -- and for over forty years thereafter -- to dangerously high levels of asbestos dust created during installation and/or removal of asbestos-containing insulation products of U.S. ships.

In the course of preparing Eagle-Picher's claims against the government, we have uncovered evidence showing that the government had first-hand knowledge of hazards associated with exposure to asbestos dust, but chose to conceal that knowledge. For example, (1) as early as 1932, U.S. Public Health Service officials participated in an epidemiological study that showed a significant link between exposure to asbestos and the development of asbestosis; (2) the results of the epidemiological study showed that a significant proportion -- roughly thirty percent -- of the workers in the exposed group had already developed asbestosis or pneumoconiosis as a result of their exposure to asbestos; and (3) the United States never published, discussed or in any way disseminated the results of its collaborative effort despite the fact that, as World War II approached, the government became increasingly aware of the substantial risk of asbestos health hazards in government shipyards and private shipyards under government contract.

Further specific examples of the government's increasing awareness during the World War II period of shipyard health hazards include the following:

(1) In 1937, the Association of Military Surgeons of the United States (of which the Surgeon General of the Navy was president) concluded that "asbestos . . . has been shown by experimental and clinical observations to be capable of producing an interstitial form of pulmonary fibrosis";

(2) In 1940, the Senior Medical Officer of Brooklyn Naval Shipyard, Captain Ernest W. Brown, reported that asbestos was one of the chief potential health hazards among insulation workers at Navy shipyards;

(3) In 1940, an Assistant Secretary of the Navy warned a shipyard commandant of the dangers of working with asbestos, and recommended use of respirators;

(4) In 1941, the Director of Preventive Medicine of the Navy Medical Corps reported to the Surgeon General of the Navy that "We are having a considerable amount of work done in asbestos and from my observation I am certain that we are not protecting the men as we should. This is a matter of official report from several of our Navy yards.";

(5) During World War II, the government was aware -- from internal unpublished and classified government reports of occupational health surveys performed by the U.S. Navy and the U.S. Maritime Commission -- that shipyard workers were being exposed to asbestos under the most abominable conditions;

(6) One report of an occupational health survey of a major Navy contract shipyard concluded that: "conditions in the pipecovering shop presented "a very real asbestosis hazard"; and

(7) A subsequent survey performed at the same shipyard two years later revealed that chest x-rays of six out of thirty-eight workers in

> the shipyard's pipecovering shop had findings consistent with a diagnosis of asbestosis.

The evidence we have collected also shows that, even with its vast knowledge of asbestos health hazards and the abominable conditions in its shipyards, the federal government itself took steps to ensure that its specifications requiring asbestos were not changed and that no information concerning health hazards reached shipyard workers because the government found that such information would cause labor "unrest," lead to "possible damage suits from workers in shipyards," and lead to "disturbances in the labor element," thus hindering the massive wartime shipbuilding effort. These are direct quotations from World War II internal correspondence and memoranda retrieved from government archives.

After World War II, government safety regulations and precautions were regularly ignored, disregarded, and generally unenforced. As recently as 1982, the government was still failing to protect Navy personnel whom the government regularly exposed to unconscionably high levels of asbestos dust during "rip-out" operations.

The United States government, rather than protect the welfare of its citizens and promote the common good, hides behind its hyper-technical sovereign immunity shield created by the discretionary function exception. The government does not dispute that the massive World War II shipbuilding effort was vital to the Allies' victory; it does not dispute the critical role that asbestos-containing insulation products played in making our battleships and merchant ships seaworthy and strong in withstanding enemy fire; it does not dispute that it maintained exclusive control over the shipyard workplace and was completely responsible for shipyard working conditions and occupational health and safety; it does not even dispute that it conducted studies about the hazards of asbestos exposure and concealed much of the information it learned from the manufacturers and from the workers themselves.

Indeed, the government has affirmatively relied upon such facts in successfully asserting the discretionary function exception in defense of claims by merchant seamen for damages allegedly caused by their exposure to asbestos onboard the United States' merchant fleet during World War II. Even more significantly, the U.S. Department of Justice, in its most recent monograph on the discretionary function exception (issued in response to the Berkovitz and Dube decisions), continues to insist that, "under present law, the exception will generally bar suits for . . . failure to enforce health and safety standards."

Occupational disease resulting from asbestos exposure during World War II may have been a necessary cost of victory, much preferable to the cost of losing the war. However, if winning the war was a common effort undertaken for the common good, the burden of these lawsuits should not fall solely and exclusively on corporations who (i) provided the very products the government mandated; and (ii) were not responsible for work conditions in shipyards.

## The Manufacturers' Legal Claims Against The Government

Clearly, equity and fairness support government involvement in finding a solution to this problem. That is not to say that there is not also a strong legal case to be made, and we have been making it in the courts.

In Dube, the one case thus far in which Eagle-Picher and other manufacturers were allowed to submit proof of the government's negligence, the lower court held that the government shared responsibility for the death of a shipyard worker's daughter for failing to warn of the health risks of asbestos exposure to members of workers' households. The court further found that the manufacturers had established their legal right to contribution from the government for Mrs. Dube's death. However, the lower court held that the discretionary function exception immunized the government from having to pay its fair share of the liabilities.

On appeal, the United States Court of Appeals for the First Circuit reversed, holding that the government's failure to warn, as required by state law, of the potential hazards of household exposure, where the government knew of those hazards and was acting in its capacity as owner and operator of a shipyard, was not discretionary. The Dube case clearly illustrates that, given an opportunity to present the facts of the government's negligence fairly and squarely, the manufacturers can establish their legal right to contribution from the government.

In reaching its decision, the First Circuit relied upon the recent U.S. Supreme Court decision in Berkovitz v. United States, 486 U.S. 531 (1988). The Berkovitz court found that (i) "the discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment," and (ii) the discretionary function exception does not shield the United States from liability where the government negligently fails to comply with applicable government statutes, regulations, or policies that prescribe a specific course of conduct. Although both Dube and Berkovitz represent significant progress, specific legislation, such as S.464, is necessary to avoid the frustrations and inequities of first litigating the applicability of the discretionary function exception in every case involving workplace injuries before the government's liability can be determined.

S.464 would also serve to redirect the expenditure of the government's own funds. The cost to the government of continuing to assert technical defenses to manufacturers' and workers' legitimate claims is enormous. For example, the government reported in connection with Fiscal Year 1988 appropriations that it had already spent over twenty million dollars on asbestos litigation support services alone -- that is, for services such as document reviews, non-professional support staff, etc. Thus the total cost to the government of defending against legitimate and meritorious claims -- including professional staff salaries and other expenditures -- may well have already exceeded several hundred million dollars. The government's money would be infinitely better spent in confronting the merits of workplace injury claims rather than in asserting hypertechnical defenses to such claims.

## Needed For A Solution, Notable By Its Absence: The United States Government

Senate bill 464 does not create any new substantive rights. Indeed, even now a plaintiff -- manufacturer or shipyard worker -- may bring suit against the United States. Recovery, however, is based not on the merits of the case, but on whether the plaintiff can surmount the hypertechnical discretionary function hurdle. By removing the discretionary function exception from the government's arsenal of defenses in cases arising from the government's negligence in the workplace or its violation of its own health and safety standards, S. 464 reflects recent trends in the case law, including the Berkovitz and Dube decisions.

In short, S. 464 gives plaintiffs (including injured workers and their families as well as manufacturers seeking contribution for damages paid to injured workers as the result of government negligence) a "day in court" by blocking the government's access to the argument that its negligent actions (or its violation of occupational safety and health standards) were discretionary acts "above the law."

The time has come for leadership and for legislation that will allow the courts fairly to assign the liabilities of workplace injuries without having to worry about technical and special governmental immunities unsupported by any policy purpose applicable to these circumstances. Eagle-Picher challenges the government to defend itself on the merits. During World War II, Eagle-Picher and other former manufacturers of asbestos-containing insulation products responded to the country's needs quickly, efficiently and patriotically. Today Eagle-Picher asks for nothing more in return than fundamental fairness, which S. 464 provides.

Senator HEFLIN. With that, we will conclude the hearing.

[Whereupon, at 3:58 p.m., the subcommittee was adjourned.]

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